Air Permitting Forum

Shannon S. Broome
Executive Director | sbroome@HuntonAK.com
Robert J. Morehouse
Director | rmorehouse@HuntonAK.com
Charles H. Knauss
Counsel | cknauss@HuntonAK.com
Richard M. Pavlak
Manager | rpavlak@HuntonAK.com

COMMENTS OF THE AIR PERMITTING FORUM

on

Draft Guidance: "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

Submitted October 5, 2018

The Air Permitting Forum (APF or the Forum) submits these comments in response to the U.S. Environmental Protection Agency's (EPA's or the Agency's) Draft Guidance entitled *Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas* (Sept. 4, 2018) (herein after referred to as the "Draft Guidance").[1] The Forum is a coalition of companies focused on implementation issues under the Clean Air Act (CAA or the Act), including pre-construction New Source Review (NSR) and Title V permitting, as well as standard-setting under the National Ambient Air Quality Standards (NAAQS), National Emission Standards for Hazardous Air Pollutants (NESHAP), New Source Performance Standards (NSPS) and Existing Source Performance Standards (ESPS) programs. Forum members are subject to numerous CAA regulatory requirements and are uniquely situated to address the importance of increasing transparency and consistency in the development of these regulations.

In light of the important role that source determinations play in CAA permitting, the Forum supports EPA's effort to provide clarity on the interpretation of the term "adjacent" in the regulatory stationary source definition. We begin with the initial premise that in the various statutory provisions in Title I, Title III, and Title V of the Act, where the terms "source," "major source," "major stationary source," "major emitting facility" and other similar terms are defined, the word "adjacent" is nowhere to be found. Rather, the provisions use the word "contiguous" or "contiguous area."[2] The word "adjacent" appears only in EPA regulations—arguably to give meaning to the statutory phrase "contiguous area." The importance of this fact is that with this Draft Guidance

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[1] Mem. from William L. Wehrum, Assistant Adm'r, Office Air and Radiation, EPA to Reg'l Air Div. Dirs., Regions 1-10, *Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas*, (Draft for Public Review & Comment, Sept. 4, 2018) .

[2] *See, e.g.*, CAA §112(a)(1), 42 U.S.C. § 7412(a)(1) ("The term 'major source' means any stationary source or group of stationary sources located within a contiguous area and under common control . . .."); CAA § 302, 42 U.S.C. § 7602; CAA § 501(2), 42 U.S.C. § 7661(2) ("The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following: . . ..").

Shannon S. Broome
Executive Director | sbroome@HuntonAK.com
Robert J. Morehouse
Director | rmorehouse@HuntonAK.com
Charles H. Knauss
Counsel | cknauss@HuntonAK.com
Richard M. Pavlak
Manager | rpavlak@HuntonAK.com

EPA is interpreting its own regulations. Therefore, EPA is entitled to even greater deference than it would when interpreting the authorizing statute.

In determining whether activities constitute a single stationary source, EPA's regulations focus on whether the activities:

1. are located on one or more contiguous or adjacent properties;
2. are under the control of the same persons (or persons under common control) (commonly known as "common control"); and
3. belong to the same major industrial grouping (based on the same two-digit SIC code).[3]

It is important to recognize that all three criteria listed above must be met for activities to be considered part of the same "stationary source" for purposes of NSR/ Prevention of Significant Deterioration (PSD) or Title V permitting. In addition, the three factor test for aggregation is also generally considered in light of the requirements under *Alabama Power Co. v Costle,* 636 F.2d 323 (D.C. Cir. 1979), in that EPA has generally found that a source must meet the component terms of stationary source (building, structure, facility or installation) as well as comport with the common sense notion of a plant.

Over the years, in the context of permitting decisions and enforcement, EPA has taken varying positions in a range of factual contexts that at times have departed from these fundamental criteria, in part by ignoring their plain language and superimposing a fourth and overriding criterion—functional interrelatedness—under which EPA would determine non-contiguous, non-adjacent activities to be adjacent if there was a functional relationship between them, straining the regulatory text to the breaking point.

The detailed comments that follow focus on the following key points with regard to EPA's interpretation:

- The Forum supports EPA's decision to clarify its interpretation of the term "adjacent" in NSR and Title V source determinations.
- The Draft Guidance's interpretation is consistent with the dictionary and common sense meaning of "adjacent" and the original intent of the test.
- Any previous approaches incorporating functional interrelatedness were inconsistent with the regulatory language and impermissibly revised the regulation.

[3] 40 C.F.R. § 52.21(6); 40 C.F.R. § 63.2; 40 C.F.R. § 70.2.

- The Draft Guidance's interpretation should not be limited to prospective application. Sources that were improperly determined to be a single source based on the previous, flawed interpretations should have the option to be reevaluated based on the proper concept of "adjacent' as provided in the Draft Guidance.

DETAILED COMMENTS

I. The Forum supports the interpretation of "adjacent" for New Source Review and Title V source determinations in the Draft Guidance.

In both NSR pre-construction permitting programs and Title V operating permit programs, the first step is determining the scope of activities that constitute the stationary source that may be subject to the requirements. EPA defines "stationary source" to mean "any building, structure, facility, or installation which emits or may emit" certain pollutants.[4] EPA further defines "building, structure, facility, or installation" using a three-part test: (1) they belong to the same industrial grouping (*i.e.*, they share the same Standard Industrial Classification two-digit code); (2) they are located on one or more contiguous or adjacent properties; and (3) they are under the control of the same person.[5] It is the second part of the test—located on one or more contiguous or *adjacent* properties—that is at issue in EPA's clarification in the Draft Guidance. The Forum strongly supports the Draft Guidance's approach to interpreting "adjacent" to mean solely the physical proximity and ***not*** any functional interrelatedness of the sources being considered.

The three-part test for determining what constitutes a single stationary source dates back to the 1980 PSD rules and was in response to the D.C. Circuit's opinion in *Alabama Power*, wherein the court criticized EPA's previous test.[6] In *Alabama Power*, the court directed EPA to develop regulatory definitions and create a new regulatory test that would "provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership."[7] The court emphasized

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[4] *See* 40 C.F.R. § 52.21(b)(5). Although neither the term "stationary source" nor "source" is specifically defined in the NSR or Title V provisions of the Act, the court in *Alabama Power* held that the "applicable definition is provided in section 111." 636 F.2d at 396.

[5] 40 C.F.R. §§ 52.21(b)(6), 71.2.

[6] *Alabama Power* is still authoritative regarding the statutory definition of a 'source.'" The Supreme Court's subsequent decision in *Chevron, U.S.A., Inc. v. NRDC, Inc.* merely affirmed EPA's discretion to adopt a specific interpretation of "stationary source" under the CAA—the Court did not overrule *Alabama Power*. 467 U.S. 837, 866 (1984). The Supreme Court and other courts have continued to rely on *Alabama Power* in the years since then, as has EPA. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2448-49 (2014) (citing *Alabama Power*).

[7] *Alabama Power*, 636 F.2d at 397.

the limitations on trying to expand the statutory definition of a source: "Because of the limited scope afforded the term 'source' in section 111(a)(3), however, *EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms* [*i.e.*, building, structure, facility, or installation]."[8]

In the preamble to the 1980 PSD rules, EPA explained the purpose of the three-part test: (1) to carry out reasonably the purposes of the PSD program; (2) to approximate a common sense notion of "plant"; and (3) to avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."[9] It is clear from the preamble that, when the three-part test was adopted, EPA never intended for the adjective "adjacent" to be interpreted to encompass "functional interrelatedness" as it has come to mean as a result of case-by-case determinations focused more on the end result than the actual regulatory test.

As acknowledged in the Draft Guidance, EPA expressly requested comments on "whether factors other than proximity and control, such as *functional relationship* of one activity to another, should be used" in determining what constitutes the source.[10] At the end of the day, however, EPA rejected inclusion of functional relationship.

> In adopting the new definition of "source," EPA rejected the requests of those commenters who thought that the proposed definition would not be inclusive enough. As noted above, they urged that EPA formulate a definition that looked only to proximity and *function*. But such a definition by looking to function would unnecessarily increase uncertainty and drain the Agency's resources. In addition, such a definition would present groupings, such as the example the commenters gave, that would severely strain the boundaries of even the most elastic of the four terms, "building," "structure," "facility," and "installation."[11]

By subsequently interpreting "adjacent" to include the concept of "functional interrelationship" after expressly considering them two separate and distinct concepts and rejecting the latter as an appropriate consideration, EPA in effect revised the regulations without providing notice and opportunity to comment. Additionally, that *de facto* revision was directly contrary to the promulgated test. No longer did the words have their ordinary meaning; instead they came to mean whatever EPA wanted them to mean in any given situation.

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[8] *Id.* (emphasis added).
[9] *See* 45 Fed. Reg. 52,676, 52,693-94 (Aug. 7, 1980).
[10] 45 Fed. Reg. at 52,694 col. 1 (emphasis added).
[11] 45 Fed. Reg. at 52,695 col. 2.

The term "adjacent" by any known definition relates solely to the physical location of one thing in relation to another thing (their proximity to one another).[12] And that is the context in which it was used when the 1980 PSD rules were promulgated. To consider the functional interrelationship of the two sources in determining whether they are "adjacent" is to assign an entirely new meaning to the word and to effectively rewrite the second part of the test.[13] Where the regulatory language itself was focused on the physical location of the properties upon which the sources were located, certain of EPA's previous determinations inappropriately shifted the focus to the purpose of the sources themselves. So basically, EPA sometimes used the term "adjacent" as a means to evaluate the functional relationship between the sources reading into the regulations an entirely new factor and making it a four-part test instead of three as stated in its regulations.

Under some of the prior interpretations, the physical location of the property became secondary or, worse, irrelevant. Sources determined to be "functionally interrelated" could be considered to be located on adjacent properties regardless of the physical distance between them. Some extreme examples include:

- American Soda Commercial Mine and processing plant: separated by 35-40 miles, connected by a 44-mile long pipeline.[14]
- Great Salt Lake Minerals plant and a pump station: separated by 21.5 miles, connected by a dedicated channel or "pipeline."[15]
- Anheuser-Busch, Inc. brewery and the Nutri-Turf, Inc. landfarm: separated by approximately 6 miles, connected by a pipeline.[16]

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[12] 2018 Merriam-Webster, Inc., Merriam-Webster online dictionary: *not distant: nearby*; Cambridge University Press 2018, Cambridge online dictionary: *very near, or with nothing in between*; 2018 Oxford University Press, Oxford online dictionary: *next to or adjoining something else*.

[13] *See Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012) (rejecting EPA's argument that the term "adjacent" addresses the purpose of the activities, not just the physical distance between them; and finding that EPA's interpretation undermines the plain meaning of the text).

[14] Letter from Richard R. Long, Dir., Air & Radiation Program, EPA Region 8 to Dennis Myers, Colo. Dep't of Pub. Health & Env't (Apr. 20, 1999), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/amersoda.pdf.

[15] Letter from Richard R. Long, Dir., Air Program, EPA Region 8 to Lynn R. Menlove, Manager, New Source Review Section, Utah Dep't of Envtl. Quality (Aug. 8, 1997), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/util-at1.pdf.

[16] Mem. from Robert G. Kellam, Acting Dir., Info. Transfer & Program Integration Div., Office of Air Quality Planning & Standards, EPA to Richard R. Long, Dir., Air Program, EPA Region 8 (Aug. 27, 1996), *available at* https://www.epa.gov/sites/production/files/2015-08/documents/abnt.pdf.

It is hard to conceive that facilities located so far apart truly comport with the "common sense notion of a plant," regardless of their connection via pipeline or some other conveyance. The test thus shifted and was no longer focused on physical location as it should have been, but on how the sources' activities related to one another.

EPA's Draft Guidance rightfully confirms a proper meaning of the term "adjacent" consistent with its use in the existing promulgated regulation. The Forum supports this interpretation. Any previous approaches that incorporated a consideration of functional relationship, strained at best and an unlawful rewriting of the test at worst, were not necessary to fulfill the objective of determining a source based on "the common sense notion of a plant." The interpretation in the Draft Guidance, which is completely consistent with the regulatory language, more than achieves that goal. Additionally, EPA notes in the Draft Guidance that it evaluated "adjacent" in the oil and gas context using a ¼ mile distance as an indicator of adjacency. Without agreeing that this is necessarily an appropriate definition of adjacent, the Forum thinks it is instructive as an outer bound of what EPA should consider adjacent. Further, closer proximity should generally be required for manufacturing operations to be considered a single source.

II. The Draft Guidance's interpretation is based on the plain language of the regulations and sources should not be precluded from applying the interpretation to prior inappropriate determinations based on a functional relatedness test.

The Draft Guidance's interpretation should not be limited to prospective decisions at the discretion of the permitting authority. While EPA's clarification of the proper test should not disrupt settled expectations of companies that have relied on a single source determination,[17] companies should not be forced to continue to treat separate sources as a single source merely because EPA or a state applied a flawed test years ago. In short, activities determined to be a single source based on previous flawed interpretations of "adjacent" should have the option to have that determination revisited.

In all likelihood, such determinations resulted in at least one of the activities that otherwise would have been considered a minor or area source being considered a major source. As EPA is aware, the requirements applicable to a major source (*e.g.*, PSD and Title V permitting, Compliance Assurance Monitoring (CAM) requirements, increased fees) are much more onerous and costly as compared to those applicable to

[17] In rare instances, sources may have conducted netting analyses that relied on non-adjacent, but functionally interrelated, sources being a single stationary source. In such cases, investments would have been made and generally subject to permitting such that public expectations would not be disrupted by maintaining the original approach. As long as any reductions remain enforceable, EPA could allow a future separation of the sources without affecting the prior netting decision.

a minor source. Sources wrongfully determined to be a single major source should have the option to be relieved from those burdensome requirements.

As to the impact this would have on the public's current understanding of existing sources, that is not a sufficient basis to continue to impose onerous and costly burdens on the owner/operator of the sources. Moreover, it is highly doubtful that a member of the general public would consider sources 40 miles apart, such as the American Soda Commercial Mine and processing plant, to be a single source, should they even think of the issue. Only those that have an interest in the permit would likely even know about EPA's previous determination and such individuals would likely become aware of the change as part of any subsequent permitting activity.

CONCLUSION

The Forum requests that EPA finalize the Draft Guidance taking into consideration these comments with respect to separate sources previously erroneously determined to be a single source. For questions regarding these comments, please contact: Shannon Broome at SBroome@HuntonAK.com, Chuck Knauss at CKnauss@HuntonAK.com, or Bob Morehouse at RMorehouse@HuntonAK.com.

October 5, 2018

William L. Wehrum, Assistant Administrator Air and Radiation
Office of Air and Radiation, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Attention: Informal Docket for EPA's Draft Guidance "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas" *Submitted via web-based portal (https://www.epa.gov/nsr/forms/interpreting-adjacent-source-determinations) and as an attachment to: Adjacency_Guidance@epa.gov*

Re: Comments on Environmental Protection Agency's ("EPA's") Draft Guidance on Source Determinations (September 4, 2018)

Dear Assistant Administrator Wehrum,

The Associations included on the attached List of Associations (collectively "the Associations") respectfully submit the attached comments on the Environmental Protection Agency's (EPA's) draft guidance, "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas." ("draft guidance").[1] We support EPA's efforts to restore the major NSR regulations and other air regulations to their proper scope, and greatly appreciate the opportunity to provide comment on the draft guidance before EPA issues a final version. We believe upfront engagement can improve the final product.

As explained further in our comments, EPA should expand or modify certain areas of the draft guidance to improve the clarity and usefulness of the final guidance. In summary, we recommend that the final guidance:

- Address the entirety of the phrase "contiguous and adjacent properties," rather than just the component term "adjacent";
- Recognize that EPA's interpretation applies for purposes of Section 112 Maximum Achievable Control Technology (MACT) stationary source determinations;
- Use the term "pollutant-emitting activities," rather than "operations";
- Focus on proximate "properties," not "operations";
- Consider using distance ranges as parameters for explaining the level of rationale needed to aggregate properties;

[1] Draft Memorandum from William L. Wehrum, Assistant Administrator to Regional Air Division Directors (Sept. 4, 2018)

- Recognize that "contiguous and adjacent properties" unambiguously refers to proximity and that states have no discretion to interpret such language differently in their approved State Implementation Plans ("SIPs").
- Encourage permitting authorities to provide stationary sources with fair notice and reasonable time periods to comply when they disagree with a stationary source's determination; and,
- Recognize that reliance interests support leaving existing stationary source determinations undisturbed unless an owner or operator requests that the permitting authority re-evaluate a prior decision.

We appreciate the opportunity to comment on this draft guidance before EPA issues it in final form. If you have any questions regarding the content of these comments, please contact Ted Steichen (SteichenT@api.org, 202-682-8568) at the American Petroleum Institute for the Associations.

Signed,

American Chemistry Council (ACC)
American Coke and Coal Chemicals Institute (ACCCI)
American Forest & Paper Association (AF&PA)
American Fuel & Petrochemical Manufacturers (AFPM)
American Petroleum Institute (API)
Council of Industrial Boiler Owners (CIBO)
National Mining Association (NMA)
Portland Cement Association (PCA)
The Fertilizer Institute (TFI)
Tile Council of North America (TCNA)

Copy to:
Brendan_Mascarenhas@americanchemistry.com
dailor@accci.org
Tim_Hunt@afandpa.org
DFriedman@afpm.org
bessette@cibo.org
bwatzman@nma.org
LBaer@cement.org
ethomas@tfi.org
SMiller@tileusa.com
wood.anna@epa.gov
Feldman@api.org
Zimmerman@api.org

List of Associations

American Chemistry Council (ACC)
ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $768 billion enterprise and a key element of the nation's economy. It is among the largest exporters in the nation, accounting for fourteen percent of all U.S. goods exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

American Coke and Coal Chemicals Institute (ACCCI)
ACCCI was formed in 1944 by companies interested in establishing a forum to discuss and act upon issues of common concern to the metallurgical coke and coal chemicals industry. Today, ACCCI represents over 95 percent of the metallurgical coke produced in the U.S. and Canada, including both merchant coke producers and integrated steel companies with coke production capacity, and 100 percent of companies producing coal chemicals in the U.S. and Canada. Nearly 150 representatives from about 45 companies contribute their knowledge and expertise to enhance the effectiveness of the Institute's programs.

American Forest & Paper Association (AF&PA)
AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative — *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

American Fuel & Petrochemical Manufacturers (AFPM)
AFPM is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make millions of products that make modern life possible.

American Petroleum Institute (API)
API is the only national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and

production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 40 million Americans.

Council of Industrial Boiler Owners (CIBO)
CIBO represents the interests of America's non-utility energy products and users. It is the organization of choice for advocacy and accurate information to achieve safe and cost-effective solutions for industrial energy, technology and environmental issues.

National Mining Association (NMA)
NMA is the only national trade organization that represents the interests of mining before Congress, the administration, federal agencies, the judiciary and the media—providing a clear voice for U.S. mining. NMA's mission is to build support for public policies that will help America fully and responsibly utilize its coal and mineral resources. Headquartered in Washington, D.C., NMA has a membership of more than 300 corporations and organizations involved in various aspects of mining. NMA provides a forum for these diverse industry segments to be informed, heard and represented.

Portland Cement Association (PCA)
PCA is the leading voice for the U.S. cement manufacturing industry. Our members are responsible for more than 92 percent of the portland cement production capacity in the United States, and serve nearly every Congressional district. PCA conducts market development, engineering, research, education, technical assistance, and public affairs programs on behalf of its member companies. Our mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment.

The Fertilizer Institute (TFI)
TFI is the leading voice of the fertilizer industry, acting as an advocate for fair regulation and legislation, a consistent source for trusted information and data, a networking agent, and an outlet to publicize industry initiatives in safety and environmental stewardship. Our Mission is to represent, promote and protect the fertilizer industry through strategic initiatives.

Tile Council of North America (TCNA)
TCNA is a not-for-profit trade association representing over 99 percent of the ceramic tile manufacturing capacity in the United States. In 2017, TCNA member companies shipped $1.4 billion of domestically-made tile. TCNA's 220 members include manufacturers of ceramic tile, tile installation materials, tile equipment, raw materials, and other tile-related products.

The Associations' Comments on EPA's Draft Guidance "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

October 5, 2018

Table of Contents

1.0 Introduction

The Associations appreciate and generally support EPA's efforts to remove the uncertainty related to the term "adjacent" for purposes of source determinations, which arose from past, problematic EPA applicability determinations, court decisions, and EPA's actions relative to its obligations for regional consistency. We agree that EPA expressly rejected inclusion of the concept of "functional interrelatedness" when it adopted three criteria, including "are located on one or more contiguous or adjacent properties" ("the second criterion"), to define stationary sources in its 1980 final rule.[2] As the Sixth Circuit articulated in *Summit Petroleum,*[3] EPA's past consideration of functional interrelationship, "…is in practice completely inconsistent with the wording of [EPA's] own regulation," as the term "adjacent" unambiguously connotes physical proximity. "EPA makes an impermissible and illogical stretch when it states that one must ask the purpose for which two activities exist in order to consider whether they are adjacent to one another."[4] Accordingly, EPA cannot reasonably interpret its regulations and the phrase "contiguous or adjacent properties" to include a test of functional interrelationship. Because, however, prior EPA applicability determinations, guidance and statements unlawfully strayed from this unambiguous meaning, we agree that EPA's draft guidance, when issued in final form, would serve as constructive notice of the proper interpretation of the major New Source Review ("major NSR") and Title V regulations, and, as discussed further below, the Section 112 regulations as well.

2.0 Legal and Regulatory Background

A. The Clean Air Act (CAA) does not mandate that a stationary source encompass the largest possible collection of pollutant-emitting activities.

In the Background section of the draft guidance, EPA largely captures the regulatory requirements and implementation history related to the term "major source," as applied in the major NSR and Title V programs, and those facts are not repeated here. Notably, however, while the guidance includes important references from *Alabama Power*, it omits the relevant history in the *Alabama Power* decision that centered on EPA's attempt to expand the Section 111 definition of "stationary source" for the purposes of major NSR.[5] EPA's 1978 rule promulgated a definition of "source" that included not only Section 111's reference to "building, structure, facility or installation," but also added "equipment," "operation" and any combination of the terms.[6]

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[2] *See* 45 *Fed. Reg.* 52676, 52695 (Aug. 7, 1980).
[3] *See Summit Petroleum Corp. v. EPA,* 690 F.3d 733 (6th Cir. 2012).
[4] *Id.*
[5] *See Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).
[6] *See* 43 *Fed. Reg.* 26380, 26403 (June 19, 1978).

In *Alabama Power*, the Court rejected EPA's attempt to expand the statutory definition of "stationary source" by grouping multiple stationary source components together, and noted that Section 111's definition of "stationary source" is of "limited scope." Within that limited scope, EPA cannot "treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms [building, structure, facility or installation]."[7]

To be clear, *Alabama Power* supports the proposition that EPA retains discretion to define the component terms of "stationary source" as something akin to an affected facility for NSPS or as large as a source category listed in CAA Section 169(1).[8] There is no mandate that a stationary source encompass the largest possible entity for purposes of regulation; to the extent that EPA aggregates pollutant-emitting activity together to form a stationary source, that aggregation need only be reasonably delineated to "carry out the expressed purposes of the Act."[9] This verity, along with "a common sense notion of a plant," must serve as the guiding principles for major source determinations.

B. "Contiguous and adjacent properties" means "physical proximity" under controlling law.

It is appropriate for EPA to issue a memorandum to reaffirm that the second criterion of the "building, structure, facility, or installation" definition (i.e., "are located on one or more contiguous or adjacent properties) means proximity and not functional interrelatedness. EPA made an express determination in the 1980 legislative rule not to include functional interrelatedness as a criterion to define the component terms of the stationary source definition, and no statements or actions since that time have altered the meaning of the regulation. While EPA subsequently issued guidance memoranda and applicability determinations that purported to require consideration of functional interrelatedness, those post-hoc interpretations are patently at odds with EPA's 1980 regulatory text, and therefore, could not establish a new interpretation of that regulatory text.[10]

Because EPA's rule has not changed, EPA is free to reaffirm the meaning of its regulation through issuance of a memorandum and need not undertake any action with respect to the federal regulations to begin properly implementing its requirements. EPA's final memorandum should affirm that proximity is the only factor holding the force and effect of law in interpreting "contiguous and adjacent properties" for purpose of making stationary source determinations.

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[7] *Id.*
[8] *See* 42 U.S.C. § 7479.
[9] *Id.*
[10] The Associations also support issuance of broader guidance to address EPA's over-reaching of concepts such as "support-facility" within the SIC code criterion.

3.0 Scope of the Final Guidance

A. The final guidance should address "contiguous or adjacent properties" and not just the component term "adjacent."

In the draft guidance, EPA states, "[b]ased on those dictionary definitions, EPA has interpreted 'contiguous' to mean that parcels of land associated with the operations in question are in physical contact with one another." The title of the draft memorandum and footnote 17, however, in referring only to "adjacent," conveys the thought that EPA does not intend this memorandum to reaffirm any particular interpretation of "contiguous." EPA rationalizes that each term must be given independent meaning so as not to "render the term 'adjacent' superfluous."[11]

This position contrasts with the position EPA took in promulgating the "major source" definition for purposes of the CAA Section 112 Maximum Achievable Control Technology ("MACT") program. There, EPA determined that "Congress intended the term 'contiguous area,' as used to define major source in section 112, to have the same meaning as the term 'contiguous or adjacent property' as it is used in section § 70.2 of the promulgated part 70 permit program regulation,"[12] and that, "[t]he dictionary definition of 'contiguous' consists, in part, of 'nearby, neighboring, adjacent.' On this basis, the EPA has historically interpreted 'contiguous property' to mean the same as 'contiguous or adjacent property'…"[13] Under CAA Section 112, EPA made clear that "contiguous area" would mean that emissions units "are adjacent geographically."[14]

Accordingly, it would not be inconsistent here for EPA to reaffirm a collective meaning of the phrase "contiguous or adjacent properties" rather than focusing the guidance only on "adjacent." Such an approach is also consistent with the doctrine of *noscitur a sociis* where the meaning of a word can be derived from its association with other words. Indeed, the Associations prefer such an approach to prevent future re-interpretations of "contiguous" that may reintroduce functional interrelationships or other inappropriate concepts into the meaning of "contiguous or adjacent properties."[15]

B. The final guidance should affirm application of "proximity" for the MACT Program.

The draft guidance purports to only address the term "adjacent" relative to the major NSR and Title V programs, but this inappropriately increases the level of uncertainty related to major stationary source determinations under the Part 63 MACT standards. As noted above, in the cited preamble language, EPA expressly proposed to adopt the part 70 approach of "contiguous or

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[11] *See* draft guidance at 7.
[12] *See* 58 *Fed. Reg.* 42760, 42767 (Aug. 11, 1993).
[13] *Id.*
[14] *Id.*
[15] To settle the matter, EPA should also affirm that its separate treatment of the embedded phrase "adjacent" for purposes of the oil and gas industry also provides the industry-specific interpretation of the phrase "contiguous or adjacent property" for purposes of that industry.

adjacent properties" for purposes of the Part 63 MACT standards.[16] Yet, in the proposal, EPA relied on its flawed interpretation of "contiguous or adjacent property"[17] which considered functional interrelationships when it stated that "'adjacent' depends not only on physical distance, but on related issues arising from the type of nexus existing between facilities."[18]

As a legal matter, EPA has not established a legislative rule encompassing an interpretation of "contiguous area" that expressly includes functional interrelationships for purposes of the MACT standard program.[19] EPA, however, affirmed its intent to interpret "contiguous area" as "contiguous or adjacent properties" when it disagreed with commenters who asserted that equating the terms went beyond the statutory definition.

In fact, the DC Circuit acknowledged these preamble statements in *National Mining Assoc. v. EPA*. "The preambles to the proposed and final rules…explain in greater detail how EPA plans to identify major sources."[20] Moreover, similar to the Prevention of Significant Deterioration provisions in CAA Section 169 which draw upon the definition of "stationary source" in CAA Section 111(a), the provisions in CAA Section 112(a)(3) expressly cross reference that definition. In view of these preamble statements and the common statutory links to "stationary source," EPA would be remiss if it did not affirm that the only lawful interpretation for purposes of major NSR and Title V of the phrase "contiguous or adjacent properties" is also the only lawful interpretation of "contiguous area" under Part 63 and that, in all cases, the terms refers to "proximate" or "adjacent geographically" properties.

C. The final guidance should refer to "properties" and not "operations."

Throughout the draft guidance EPA makes statements like, "…whether or not operations are adjacent…" and "… to interpret 'adjacent' to include operations that are not physically touching."[21] These statements misrepresent the second criterion in two important ways. First, the language deviates from the common practice and definition of "building, structure, facility, or installation" by substituting the term "operations" for "pollutant-emitting activities." Second, the proper inquiry under the regulatory text for the second criterion is whether two properties are proximate not whether the pollutant-emitting activities located on the properties are proximate.

Merriam-Webster Dictionary's definition of "operations" includes such things as "a method or manner of functioning," "a small business or establishment," and "a single step performed by a computer."[22] The term "operations" is too broad and inconsistent with the concept that only "pollutant-emitting activities" are part of a stationary source. In the final guidance, EPA should

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[16] The Associations recognize that, because the Section 112 definition does not include the third criterion (SIC code), the major source identified for Section 112 purposes may be broader than the major source identified for major NSR.
[17] The Associations assume there is no significance to EPA's reference to "property" rather than "properties."
[18] *See* 58 *Fed. Reg.* at 42767.
[19] EPA neither affirmed nor rejected its proposed interpretation in the final rule, and the proposed rule was too ambiguous in its reference to "nexus" to provide an authoritative interpretation.
[20] *See National Mining Assoc., et al. v. EPA*, 59 F.3d 1351 (D.C. Cir 1995).
[21] *See d*raft guidance at 6 and 7.
[22] *See* definition of "operation," Merriam-Webster Dictionary (available at https://www merriam-webster.com/dictionary/operation) (last visited Sept. 20, 2018).

return to using the phrase "pollutant-emitting activities" and eliminate use of the term "operations" or otherwise define "operations" for purposes of the final guidance to mean "pollutant-emitting activities."

Second, the final guidance should refer to proximate properties. As a practical matter, the Associations recognize that the nearness of the pollutant-emitting activities can inform whether two properties are proximate for CAA purposes, because the physical configuration influences whether, collectively, the pollutant-emitting activities "comport with the common-sense notion of a plant." A pollutant-emitting activity located in the center of a 3000 acre property is justifiably not "nearby" another property located at a distance of, for example, 0.15 miles when, collectively, those pollutant-emitting activities could not satisfy the common-sense notion of a plant. Nonetheless, because EPA intends the final guidance as a reaffirmation of the regulatory text, the Associations request that EPA refer to "properties" rather than "operations" or "pollutant-emitting activities" in the final guidance.

D. The Associations agrees that "properties" is the "land associated with the [pollutant-emitting activities] in question.

The Associations agree that the term "properties" referenced in the second criterion is the "land associated with the [pollutant-emitting activities] in question." This properly limits the scope of the relevant land for purposes of the comparison.

4.0 Reliance on Physical or Geographical Proximity

A. Applicability of a specific CAA program should never form the basis of a "contiguous or adjacent properties" decision.

The Associations agree that the interpretation of "contiguous or adjacent properties" should "focus[ ] exclusively on physical proximity" when evaluating whether the pollutant-emitting activities belong to a single stationary source.[23] Owners and operators, in cooperation with permitting authorities, should have discretion to define the specific distance for a given set of facts by following the principles that the nearby properties contain pollutant-emitting activities that, when considered in the aggregate, "carries out the expressed purposes of the Act," and "comports with a common-sense notion of a plant."

For example, EPA stated that the "dominant purpose of PSD review is to maintain air quality within the applicable increments."[24] Thus, when an owner or operator of pollutant-emitting activities that are located on two separate properties proposes to manage emissions from those activities to prevent a significant adverse air quality impact on increments or the NAAQS in the local area, then such properties reasonably satisfy the concept of geographically nearby.

[23] *See* draft guidance at 6.
[24] *See* 45 *Fed. Reg.* at 52693.

Triggering compliance with one or more regulatory programs, however, should never form the basis of a "contiguous or adjacent property" decision. The CAA contains no express purpose of reducing as many emissions as possible through application of a specific regulatory program. Numerous CAA regulatory authorities provide states and EPA the tools to holistically and properly manage air quality. A desire to trigger the applicability of any specific regulatory program should not form the basis of a proximity decision, and EPA's final guidance should acknowledge this.

B. Any distance-related guidance should relate to the degree of supporting rationale needed for a case-by-case decision and not establish a presumption toward aggregation.

The Associations are not opposed to EPA's decision to decline to set a "bright-line" or specific distance threshold for "contiguous or adjacent properties." We also agree that "nearby" generally denotes a "side-by-side or neighboring" geographical position. If EPA opts to identify specific distances in the final guidance, it should not adopt a "bright line" distance that assumes pollutant-emitting activities should be aggregated. A presumptive distance should not serve as an unequivocal dividing line, nor should it establish a value that presumes pollutant-emitting activities should be aggregated within a set distance.

As previously stated, the CAA does not mandate that EPA include the largest possible conglomeration of pollutant-emitting activities within a stationary source just because one possible rationale exists to do so. Instead, EPA could offer owners or operators a range of distances that would differentiate the level of supporting rationale anticipated for justifying a "contiguous or adjacent properties" decision.

For example, at distances between 0.4 km (0.25 miles) to 1.0 km (0.62 miles) from the geographical center of a property, owners or operators could treat properties either as "contiguous or adjacent" or as not "contiguous or adjacent," as the owner or operator deems appropriate, without requiring further explanation. This range of separation is distant enough, in most cases, to justify a finding that two properties are not nearby.[25] Yet, when the owner or operator agrees to treat the two properties as adjacent to each other, a decision to treat the properties as geographically proximate neither defies common sense nor rational decision-making.

At a closer distance (e.g. 0.3 km), a finding that two activities are not located on "contiguous or adjacent properties" requires some level of explanation based on the case-specific facts. For example, an owner or operator could document that the land between the properties is under separate ownership or control, and not merely a right-of-way, or that the two pollutant-emitting activities historically have not been treated as located on "contiguous or adjacent properties." The Associations believe that the historical treatment of pollutant-emitting activities provides a suitable rationale to find that pollutant-emitting activities are not located on "contiguous or adjacent properties." If, under EPA's overly-inclusive approach, the activities qualify as

[25] As EPA explained in the draft guidance, EPA, for purposes of the oil and gas industry, and some states for purposes of all industry categories, apply a presumption that properties outside a ¼ mile distance are not "contiguous or adjacent properties" and, at shorter distance, use a case-by-case review to make a determination.

separate sources, no cause exists to question that determination under the proper, proximity-based approach.

At a distance greater than 1.0 km, finding that two properties are "contiguous or adjacent properties" also requires some level of explanation. Again, the Associations believe that an owner or operator may rely on historical treatment of the properties. Even under the unlawful, functionally-interrelated approach, permitting authorities sought to define a "common sense notion of a plant" and if an owner or operator does not wish to reopen that decision, no basis exists to disturb that prior finding.

Another suitable rationale for finding that two properties are "contiguous or adjacent," for example, may relate to the purposes of the Title V program. EPA identified "Facilitat[ing] Use of Market-Based Incentives" as an explicit purpose of the CAA in crafting its Title V regulations.[26] Accordingly, when an owner or operator proffers that two pollutant-emitting activities located at a distance greater than 1.0 km (but not at so great a distance as to defy the concept of "nearby") are located on "contiguous or adjacent property" because the closeness of the activities can facilitate use of market-based approaches or better manage pollution impacts from the pollutant-emitting activities, such a rationale could satisfy the level of explanation needed to make that finding, because it defines proximity in relation to carrying out the purposes of the CAA.

These examples, of course, are not intended to be all inclusive or definitive, but merely to illustrate how providing a range of distances could simplify case-by-case decisions and provide more certainty to all stakeholders. The Associations recommend that EPA include, in the final guidance, examples of the type of rationales that can justify a decision that two pollutant-emitting activities are located on or are not located on "contiguous or adjacent properties" to improve the usefulness of the guidance. For example, EPA could revisit prior applicability determinations and explain how such decisions might have been decided without consideration of functional interrelationship.

5.0 State Implementation Plan-Approved Programs and Part 70 Programs

The draft guidance states,

> To maintain owner/operators', permitting authorities', and the public's current understanding of existing sources and to foster administrative simplicity, EPA recommends that state and local permitting authorities apply this interpretation from this point forward when those authorities are for the first time assessing whether a given pair or set of operations are adjacent for purposes of Title V and NSR source determinations.[27]

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[26] *See* 56 *Fed. Reg.* 21712, 21714 (May 10, 1991) as cross-referenced in the final part 70 regulations. "These principles, which were discussed extensively in the proposal…The EPA intends that these principles be appropriately incorporated into all aspects of the program development and implementation…" 57 *Fed.Reg.* 322502, 32252 (July 21, 1992).

[27] *See* draft guidance at 8.

The Associations disagree both with the suggestion that state and local permitting authorities need not follow the meaning of the phrase "contiguous or adjacent properties," and that states should only look at applying this meaning for new stationary source determinations.

A. Because the rule text is unambiguous, EPA must require permitting authorities to follow a "proximity" interpretation.

The Associations recognize and support the need to provide states, as primary implementers of CAA requirements, broad discretion to carry out and interpret their air pollution regulations. "[A]ir pollution control at its source is the primary responsibility of States and local governments."[28] That authority, however, is not so broad as to assign unambiguous terms a wholly separate meaning from the plain language of the regulations without rulemaking.

As the Sixth Circuit chronicles in *Summit Petroleum Corp*, numerous court decisions considered the extent to which the term "adjacent' is ambiguous. In all cases, the courts concluded that "adjacent" is unambiguous in referring to something "purely physical and geographical."[29] And, while SIPs are born of state law, the rules become federal law when EPA approves the rule into the SIP. "Thus the SIP became *federal* law, not *state* law, once EPA approved it, and could not be changed unless and until EPA approved any change."[30]

As federal law, the rules of statutory construction apply for interpreting federal regulations, and, as a first principle, the plain meaning of the regulation governs, except when applying such a meaning would lead to absurd or unreasonable results.[31] Because the term "adjacent" unambiguously refers to geographic proximity, EPA has no latitude to interpret SIP rules that follow EPA's model regulatory language in using "contiguous and adjacent properties" to include such considerations as functional interrelationships, because the language is unambiguous in referring only to proximity. While the scope of "adjacent" "…is in *some* respects ambiguous… that ambiguity, however, does not conceivably extend to…" such an interpretation of the regulatory language.[32] And, because the language is unambiguous with respect to proximity, an alternative interpretation of the SIP regulations are not entitled to even an *Auer* level of deference.[33]

While a clearly expressed administrative intent can overcome a plain meaning interpretation, here, EPA concedes, in 1980, it codified a legislative rule that included a contemporaneous interpretation of "contiguous and adjacent properties" that relied solely on the concept of

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[28] *See* 42 U.S.C 7401.
[29] *See* 690 F.3d at 747.
[30] *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007). *Also See* e.g. *Trs. for Alaska v. Fink,* 17 F.3d 1209, 1210 (9th Cir. 1994) and *Union Elec. Co. v. EPA,* 515 F.2d 206, 211 (8th Cir.1975), *aff'd,* 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976)).
[31] *See e.g. Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.,* 307 F.3d 1214, 1219 (9th Cir.2002)("the plain meaning of a regulation governs); *U.S. v. Wilson, 112 S.Ct. 351,1354(1932)* and *U.S. v. Amer. Trucking Ass'n, Inc.,* 310 U.S. 534,543-44 (1940).
[32] *See Rapanos et al. v. U.S.* 547 U.S. 715,752 (2006)(finding that "waters of the United States" could not extend to storm drains and dry ditches.)
[33] *See Auer v. Robbins, 519 U.S. 452 (1997).*

proximity. In codifying part 70, EPA also stated its intent to follow the major NSR approach for defining a stationary source.[34] To provide an alternative meaning to plain, unambiguous language in approved SIPs, EPA and the state must have provided notice of such an interpretation when EPA approved the SIP and Title V programs.[35]

> Although "clearly expressed ... intent" of regulators therefore could overcome the plain meaning of a regulation,… we conclude that the notice requirements of the APA, 5 U.S.C. §§ 552(a)(1), 553(b) requires that some indication of the regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process.[36] (*citation deleted*)

Here, the regulatory text of "contiguous and adjacent properties" is unambiguous with respect to referring to proximity, and EPA established that interpretation contemporaneously with the legislative rule. To deviate from this interpretation, a State must have expressed an intent to do so at the time EPA approved its SIP or Part 70 program.

With respect to major NSR regulations, EPA's own regulatory procedures for approving SIPs further solidifies the principle that contemporaneously established rule interpretations govern. "(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:…"[37] At the time EPA approved SIPs, "proximity" was the only legislatively established meaning for the phrase "contiguous and adjacent properties." The Associations are unaware of any SIP submission or Part 70 approval notice that identified or justified an alternative interpretation.[38]

If an alternative interpretation properly exists for a SIP or Part 70 program, then EPA should identify this SIP in the final guidance. Absent such a distinction, the final guidance should affirm that "proximity" is the controlling interpretation for SIPs and Part 70 (and Section 112) using identical language to EPA's rule, and that, in considering whether "properties" are "contiguous or adjacent," there is no reasonable interpretation of the phrase that would focus the determination on "functional interrelationships" of pollutant-emitting activities rather than the properties. The Associations agree, however, that States retain some discretion to interpret proximity, and, in this respect, to the extent the final guidance suggests any methodology for determining whether properties are proximate, those statements represent non-binding guidance.

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[34] "The definitions of major sources in part D of title I have language similar to the Title V language…It is the approach followed today by EPA as a result of the Alabama Power litigation…aggregation by SIC code should be done in a manner consistent with established NSR procedures." *See* 56 *Fed.Reg.*at 21724.

[35] The Associations do not assert that this principle necessarily applies in all circumstances, but it applies to this case because EPA clearly established its interpretation of "contiguous or adjacent" contemporaneously with codifying the 1980 rule.

[36] *See Safe Air for Everyone,* 488 F. 3d at 1097-1098.

[37] *See* 40 CFR § 52.166(a)(1).

[38] Indeed, such a demonstration would be technically complex because a larger stationary source boundary is not necessarily more stringent in any given circumstances.

B. Fair-notice and a reasonable time to comply are required under a case-by-case decision-making framework.

The Associations agree that "contiguous and adjacent properties" disputes are best resolved on a case-by-case basis given each factual circumstance. Nonetheless, we disagree with any connotation that source determinations generally necessitate a case-by-case decision involving the permitting authority for each case. Such an approach is administratively unmanageable.

Owners and operators have made, and continue to make, reasoned evaluations of the stationary source implications of their pollutant-emitting activities based on a good-faith effort to apply the regulations to their factual circumstances, without necessarily consulting a permitting authority in each case. Because "nearby" is arguably subjective, it is not without expectation that, in some cases, a permitting authority may disagree with an owner or operator's assessment.

Additionally, in the past, permitting authorities have used various tools to leverage owners and operators to accept, without question, a permitting authority's revised assessments of major source status. For example, permitting authorities have provided notice of a revised major source decision for the first time by declaring a Title V permit renewal application incomplete because the application did not include information on additional pollutant-emitting activities, which historically were not part of the major source or Title V permit. This action presents significant consequences for the major source, because it could jeopardize the major source's eligibility for the permit application shield. And, it could also cause the owner or operator to incur significant costs to prepare an entirely new portion of an application, whether or not the source agrees with the permitting authority's assessment.

The final guidance should make clear that owners and operators must be provided fair notice of a permitting authority's interpretation and that such tools as a notice of violation or permit application completeness finding are not the appropriate tools to provide such notice. In addition, such determinations must apply prospectively only by providing owners and operators a reasonable period to bring the stationary source into compliance with newly applicable requirements.

C. Reliance interests support leaving prior determinations undisturbed, but only if accepted by the owner or operator.

The Associations agree that both EPA and other permitting authorities have long-applied an unlawful consideration of functional interrelationships in determining the scope of a stationary source for various air regulatory programs. Revisiting each and every one of these determinations could increase the administrative burden associated with issuing or revising permits, and adversely affect permit issuance rates.

To the extent an owner or operator remains satisfied or, at least, complacent with how pollutant-emitting activities are classified for stationary source purposes, no cause exists to revisit these determinations. An owner or operator's reliance interests support a policy of leaving these past determinations undisturbed, regardless of the methodology used in the decision.

Nevertheless, a long "entrenched executive error" is no cause to perpetuate the continuation of the practice.[39] Accordingly, when an individual owner or operator requests reconsideration of a previous single-source or multiple-source determination that rested on a foundation of functional interrelationships or other unlawful consideration, the final guidance should require that permitting authorities address these requests to properly carry out the states' obligations under the SIPs.[40] We agree, however, that, to the extent that any given pollutant-emitting activity is reclassified, any implications related to that reclassification should not apply retrospectively against the source as this would violate the fair notice doctrine.

The Associations disagree with EPA's position that "where operations have previously been considered one source for the purposes of NSR netting analyses, EPA recommends such operations should continue to be considered one source…"[41] There is no basis in law or policy for disallowing a proper classification of whether pollutant-emitting activities are on "contiguous or adjacent property." A future re-classification of pollutant-emitting activities changes nothing about the prior NSR project.[42] Assuming proper netting occurred when the activities were classified as a single source, no emissions increase occurred from the project, and any emissions reduction requirement would continue in the future, unless modified through a proper administrative procedure. The final guidance should not include this netting-based recommendation.

Moreover, to the extent that an owner or operator assumed liability for compliance with requirements for synthetic minor limitations, major NSR, Title V and other CAA requirements that would not have applied if a permitting authority made the stationary source determinations on a proper basis, the final guidance should acknowledge that these requirements may be rescinded through an appropriate administrative process.

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[39] *See Rapanos* 547 U.S. at 752.

[40] The ability for owners or operators to request that the permitting authority re-evaluate past stationary source determinations is all the more relevant and appropriate with EPA's recent acknowledgement that its prior, overly-broad application of the first criterion, "common-control," lead to "inconsistent and impractical outcomes." *See* Letter from William L. Wehrum, Assistant Administrator U.S. Environmental Protection Agency to Hon. Patrick McDonnell, Secretary of PA Dept. of Environmental Protection (Apr. 30, 2018).

[41] *See* draft guidance at 8.

[42] The Associations agree that some agreement on the distribution of contemporaneous increases and decreases between the stationary sources for potential purposes of future netting is appropriate.

COMMENTS OF THE CLASS OF '85 REGULATORY RESPONSE GROUP

ON THE

DRAFT GUIDANCE "INTERPRETING 'ADJACENT' FOR NEW SOURCE REVIEW AND TITLE V SOURCE DETERMINATIONS IN ALL INDUSTRIES OTHER THAN OIL AND GAS"

I. INTRODUCTION

On September 4, 2018, EPA released draft guidance ("Draft Guidance") that addresses the "adjacency" factor for determining whether nominally separate sources should be aggregated for the purpose of Title V and New Source Review ("NSR") permitting under the Clean Air Act ("CAA") for all industrial categories other than the oil and natural gas sector. In the Draft Guidance, EPA interprets the term "adjacent" to mean physical proximity. The Draft Guidance would not establish a bright line test, or specify a fixed distance, within which two or more operations would be deemed to be in physical proximity and, thus, "adjacent." Rather, under the Draft Guidance, permitting authorities would be responsible for making case-specific determinations based on proximity.

The Class of '85 Regulatory Response Group ("Class of '85" or "Group") respectfully submits these comments on the Draft Guidance.[1] The Class of '85 is a voluntary ad hoc coalition of over 35 electric generating companies from around the country that has been actively involved for over 25 years in the development of CAA rules that affect the electric generating industry. Members of the Class of '85 own and operate electric generating units ("EGUs") located at facilities at which a permitting authority may assess adjacency for NSR and Title V purposes. Accordingly, Group members will be impacted by EPA's final action on the Draft Guidance.

II. COMMENTS

The Class of '85 appreciates the opportunity to submit comments on EPA's Draft Guidance. The Group supports EPA's decision to revise its interpretation of "adjacent" to be based on proximity and not "functional interrelatedness." However, the Class of '85 urges EPA to revise the Draft Guidance to establish a fixed distance beyond which sources would not be considered adjacent and to explicitly prohibit "daisy chaining" of emission sources. These changes would increase regulatory certainty and ensure more predictable and consistent permitting.

A. EPA correctly interprets "adjacent" to be based on proximity.

The Draft Guidance interprets the term "adjacent" to mean physical proximity for industries other than the oil and gas sector.[2] Draft Guidance at 6. The Group supports this interpretation of "adjacent," because it reflects the plain meaning of "adjacent," is consistent

[1] Attached is a list of the Class of '85 members who support these comments.

[2] In a prior rulemaking, EPA similarly interpreted adjacency to be "based on the proximity of emitting activities" for the oil and natural gas sector. 81 Fed. Reg. 35,622, 35,622 (June 3, 2016).

with previous EPA interpretations, and would promote predictability and consistency in the permitting process.

The term "adjacent" unambiguously refers to physical proximity. In *Summit Petroleum Corp. v. EPA*, the only appellate court decision that has addressed the meaning of "adjacent" in the context of NSR and Title V permitting, the U.S. Court of Appeals for the Sixth Circuit held that "two entities are adjacent when they are '[c]lose to; lying near…[n]ext to, adjoining'" one another. *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 742 (6th Cir. 2012). Not only do dictionaries agree on this point, *see id.*, but other case law does as well. For example, the U.S. Supreme Court has addressed the definition of "adjacent" in the context of the Clean Water Act, holding that a wetland is adjacent to a navigable body of water when the wetland *physically abuts* navigable water. *Id.* at 743-44 (citing *Rapanos v. United States*, 547 U.S. 715, 748 (2006)). Any expansion of this proximity-based definition is "an impermissible and illogical stretch." *Id.* at 742.

An interpretation of "adjacent" based on proximity also would be consistent with EPA's most recent regulatory interpretations of the term. In June 2016, EPA published a final rule explaining when two or more oil and gas extraction and distribution sources should be aggregated into a single source under the NSR and Title V permitting programs. 81 Fed. Reg. 35,622 (June 3, 2016) ("Oil and Gas Aggregation Rule"). In that rulemaking, EPA interpreted adjacency to be "based on the proximity of emitting activities and consideration of whether the activities share equipment." *Id.* at 35,622. EPA stated that interpreting adjacency in terms of proximity would be consistent with the "common sense notion of a plant." *Id.* at 35,624.

EPA's proposed proximity-based interpretation of "adjacent" also would be consistent with the definition of a "source" under the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") program. Under the NESHAP regulations, a "major source" includes only stationary sources "located within a contiguous area. . ." 40 C.F.R. §§ 63.2.[3] In other words, as EPA recognized in its adjacency rulemaking for the oil and gas sector, a NESHAP source is determined based on the physical proximity of equipment. *See* 80 Fed. Reg. 56,579, 56,583 (Sept. 18, 2015). Since Group members emit criteria pollutants subject to the NSR program, as well as hazardous air pollutants subject to the NESHAP, it would be beneficial to apply a consistent approach to determining the boundaries of an affected facility across these programs. Having a consistent approach would make the permitting process more predictable by reducing regulatory uncertainty.

In sum, EPA's proposal to interpret "adjacency" in terms of physical proximity is consistent with the plain meaning of the word, the relevant case law, EPA's most recent regulatory interpretation of the term, and other CAA programs.

B. EPA appropriately proposes to exclude "functional interrelatedness" from the interpretation of "adjacent."

The Draft Guidance would make clear that "functional interrelatedness" of operations is not a relevant consideration when determining adjacency. Draft Guidance at 6. EPA states that

[3] An area source is any stationary source of hazardous air pollutants that is not a major source. 40 C.F.R. § 63.2.

it believes that "focusing exclusively on physical proximity when considering whether or not operations are adjacent is a more objective and reasonable approach, and one that is more consistent with the dictionary meaning of 'adjacent,' the 'common sense notion of a plant,' and the original intent expressed in the early development of the NSR program." *Id.* The Group supports EPA's decision to discontinue its consideration of "functional interrelatedness" when determining adjacency.

First, EPA cannot interpret "adjacent" in terms of functional interrelatedness because the Agency lacks the authority to read functional interrelatedness into the unambiguous meaning of "adjacent." *Summit Petroleum*, 690 F.3d at 741–44. As explained above, "adjacent" plainly refers to physical proximity, and defining the term based on "functional interrelatedness" is "an impermissible and illogical stretch." *Id.*

Second, an interpretation of "adjacent" based on functional interrelatedness is inconsistent with EPA's existing regulations because it would render the adjacency requirement meaningless. A stationary source "means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person." 40 C.F.R. §§ 52.21(b)(5)-(6); *see also* 40 C.F.R § 70.2. A determination that emission units are functionally interrelated would be synonymous with a determination that the emission units belong to the same industrial grouping and are under the control of the same person. The third element for determining whether to aggregate emission units into a single stationary source (*i.e.*, that emission units be located on contiguous or adjacent properties) would have no independent purpose. EPA cannot interpret its regulations in a way that renders a key regulatory requirement meaningless.

Third, interpreting "adjacency" based on functional interrelatedness is not practical because, as EPA has recognized, functional interrelatedness is vague and would need to be assessed on a case-by-case basis. Draft Guidance at 7. In 2015, EPA proposed to presume that two pieces of equipment in an oil and gas field that were exclusively functionally interrelated were "adjacent." 80 Fed. Reg. at 56,587. EPA rejected this approach in its final rulemaking because of the difficulty in applying this test consistently. 81 Fed. Reg. at 35,629.

Similarly, in the preamble to the final 1980 NSR Rule, EPA explained that, while the Agency requested comment on whether a source should be interpreted in terms of the "functional relationship of one activity to another" in addition to physical proximity, EPA ultimately declined to interpret "adjacency" based on functional interrelatedness.[4] 45 Fed. Reg. 52,676, 52,694 (Aug. 7, 1980). EPA concluded that a functional interrelatedness criterion would be "highly subjective" and would make "administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous fine-grained analyses." *Id.* at 52,695. Thus, "looking to function would unnecessarily increase uncertainty and drain the Agency's resources." *Id.* EPA's prior conclusions that interpreting "adjacency" based on functional interrelatedness would be burdensome and result in unpredictable and inconsistent outcomes remains true today. Thus, the

[4] Although EPA subsequently attempted to consider functional interrelatedness on a case-by-case basis in certain adjacency determinations, EPA has not reversed its opinion that doing so is more administratively burdensome and subjective.

Group supports eliminating "functional interrelatedness" as a criterion to be considered when determining "adjacency."

C. EPA should establish a threshold beyond which sources would not be considered adjacent.

The Draft Guidance makes clear that EPA is not "establishing a 'bright line' test or specifying a fixed distance, *within which* two or more operations will be deemed to be in physical proximity and, thus 'adjacent.'" Draft Guidance at 7. The Group agrees that such a bright line should not be established but urges EPA to consider establishing a threshold *beyond which* sources would clearly not be considered adjacent. This would significantly increase clarity and certainty about which sources should be aggregated for the purposes of Title V and NSR permitting.

The Group specifically supports utilizing a threshold like the test that EPA promulgated in its Oil and Gas Aggregation Rule. In that rulemaking, EPA established that pollutant-emitting equipment are considered adjacent if, and only if, they are located on the same surface site or the activities both (1) are within one-quarter of a mile of each other (measured from the center of the equipment on the surface site) and (2) share equipment. 81 Fed. Reg. at 35,629. EPA reasoned that by "providing a clear limit on the distance within which we would require analysis of the relationship of the equipment, we believe permitting will proceed more quickly, and with more certainty for permitting authorities and the regulated community." *Id.* This same reasoning supports creating a threshold for other industrial categories.

EPA should make clear in its final guidance document that, although the determination of adjacency should be made on a case-by-case basis, two sources would not be eligible for consideration as adjacent unless they are either located on the same surface site or they (1) are within one-quarter of a mile of each other (measured from the center of the equipment on the surface site), [5] *and* (2) share equipment. This would promote clarity and limit circumstances where there could be disagreement on whether sources should be aggregated.

D. EPA should prohibit "daisy chaining" of emission units.

The Draft Guidance does not address whether "daisy chained" units are considered adjacent. Series of emission units are considered "daisy chained" where each individual unit is located adjacent to the next unit, but where the last unit is separated from the first unit by a much larger distance. The Group urges EPA to revise the Draft Guidance to explicitly prohibit the use of "daisy chaining" in an adjacency determination.

First, "daisy chaining" should not be applied in an adjacency determination because the practice is inconsistent with the plain meaning of "adjacent." As explained above, the term "adjacent" unambiguously requires close physical proximity. When emission units are "daisy chained" together, the first and last emission units are not in close physical proximity and, therefore, should not be considered adjacent.

[5] The distance should not be measured from the property boundary of one emission unit to the property boundary of another emission unit because the property boundary does not provide an accurate indication of the actual location of the emission point.

Second, allowing "daisy chaining" is inconsistent with previous EPA rulemakings, as well as with several state permitting programs. In the preamble to the 1980 NSR rule, EPA stated that the Agency "does not intend 'source' to encompass activities that would be many miles apart along a long-line operation" such as "a pipeline or electrical power line." 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980). "For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one 'source.'" *Id.* Similarly, in 2016, EPA decided it was "not adopting a requirement to include 'daisy chained' equipment as part of a single source" in the oil and gas context. 81 Fed. Reg. at 35,627. EPA stated that doing otherwise would "increase the permitting burden" without providing "additional air quality benefits." *Id.* However, EPA did grant discretion to the permitting authority to determine whether "daisy chained" equipment should be considered as a single source on an individual case-by-case basis. *Id.*

Several states, including Louisiana and Pennsylvania, have fully banned "daisy chaining" in NSR and Title V permitting determinations.[6] EPA should prohibit "daisy chaining" to ensure consistency with longstanding Agency policy, as well as with state programs. Fully prohibiting the "daisy chaining" of emission units would also provide increased certainty and predictability in the NSR and Title V permitting processes because it would be clear that those types of units would not be considered adjacent.

III. CONCLUSION

The Class of '85 appreciates this opportunity to comment on the Draft Guidance. As explained in its comments, the Group urges EPA to publish a final guidance document interpreting "adjacent" in terms of proximity and not functional interrelatedness. This would provide for an interpretation of "adjacent" that is legally defensible and consistent with previous EPA actions. The Group also urges EPA to revise the guidance to include a threshold beyond which sources would clearly not be considered adjacent and to prohibit "daisy chaining" of emission sources. These changes would increase regulatory certainty and predictability in the NSR and Title V permitting processes.

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[6] Pennsylvania Department of Environmental Protection, Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries, *available at* http://www.depgreenport.state.pa.us/elibrary/PDFProvider.ashx?action=PDFStream&docID=7745&chksum=&revision=0&docName=GUIDANCE+FOR+PERFORMING+SINGLE+STATIONARY+SOURCE+DETERMINATION+FOR+OIL+AND+GAS+INDUSTRIES.PDF&nativeExt=pdf&PromptToSave=False&Size=365720&ViewerMode=2&overlay=0; Louisiana Department of Environmental Quality, Interpretation of Contiguous for Oil and Gas, http://deq.louisiana.gov/page/-contiguous-or-adjacent-properties-in-the-oil-and-natural-gas-sector.

Dated: October 5, 2018

Respectfully submitted,

Debra J. Jezouit
Allison Watkins Mallick
Rachel F. Kenigsberg
Baker Botts L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700

CLASS OF '85 REGULATORY RESPONSE GROUP

AES Corporation
Alliant Energy Corporation
Arizona Electric Power Cooperative, Inc.
Arkansas Electric Cooperative Corporation
City of Tallahassee
Cleco Corporation
Cogentrix Energy Power Management, LLC
Dairyland Power Cooperative
Dayton Power & Light Company
Entergy Services, Inc.
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Florida Municipal Power Agency
Florida Power & Light Company
Gainesville Regional Utilities
Great River Energy
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Louisville Gas & Electric/Kentucky Utilities
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Orlando Utilities Commission
Portland General Electric
PowerSouth Energy Cooperative
Public Service Company of New Mexico
Salt River Project
Talen Energy
Tampa Electric Company
Westar Energy
Western Farmers Electric Cooperative
Xcel Energy Inc.

Indiana Farm Bureau®
225 S. East Street • P.O. Box 1290 • Indianapolis, IN 46206
Telephone: (317) 692-7851 • Toll Free: (800) 327-6287
FAX: (317) 692-7854 • www.infb.org

October 5, 2018

SUBMITTED VIA ELECTRONIC MAIL

Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
c/o Adjacency_Guidance@epa.gov

RE: Comments on the Draft US EPA Memorandum "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

Indiana Farm Bureau, Inc. (INFB) represents over 70,000 families who earn their livelihood from agricultural production. We strive to protect our members' interest in environmental regulation through seeking transparent and clear regulatory provisions. Our members also believe that protection of the environment is a critical consideration in all farm management decisions. We thank the Environmental Protection Agency for proposing this rule change and for considering these comments.

INFB appreciates the opportunity to offer written comments on the above draft memorandum, published on US EPA's web site on September 4, 2018. We strongly agree with US EPA that interpretation of "adjacent" should focus solely on geographical proximity when making source determinations under the Clean Air Act permit programs. We also agree with EPA that functional interrelatedness of the facilities is irrelevant for purposes of determining whether facilities are adjacent. The interpretation is consistent with the terms and definitions in the Clean Air Act, and is also consistent with the plain and ordinary meaning of the term.

Farmers in Indiana have a significant interest in the draft memorandum because there is a very large, highly diverse, and unique array of business arrangements in farming, particularly in the livestock production sector, which makes it quite distinct from most other business sectors. Because of the general geographic proximity and the business relationship of farms, state permitting agencies which implement current EPA policies can be faced with a variety of complex factors to determine whether the farms should be considered a single production unit, analogous to a single facility or "plant." This would likely lead to inconsistent and unfair applicability of permitting programs among states and perhaps even within states.

With the sheer variety of business and functional relationships among farmers, it is imperative EPA develop clear guidance for states to determine whether two or more farms should be aggregated as a single source. In our view, interpreting the term "adjacent' solely to one of physical proximity is a strong step in the right direction. As our comments below show, we believe the guidance could be strengthened by developing a bright line distance beyond which no two facilities would be considered part of the same source.

Our comments can be summarized as follows:

1. Interpreting the term "adjacent" based on physical or geographical proximity is the most objective and reasonable approach to determining whether two or more facilities should be aggregated as one common source. Excluding the concept of "functional interrelatedness" from the question of whether facilities are part of the same source eliminates complexity, confusion, and opportunity for inconsistent application of the interpretation. Furthermore, an interpretation based on physical proximity follows the definitions in the Clean Air Act, court rulings, EPA's historical intent, and the ordinary meaning of the term adjacent.

2. There is no need to insert the concept of functional interrelatedness into the determination of contiguous or adjacent because the concept is addressed in a simple and clear manner in one of the other criteria in the 3-prong test for source determinations. The criteria of "same industrial grouping" (same 2-digit SIC code or support facility), provides a simple means of evaluating functional relationship between sources, and should be the only criteria used to assess the functional interrelatedness of sources.
3. We support strengthening the draft guidance by defining adjacency to exclude any pollutant emitting activities under common ownership or common control which are taking place more than ¼ mile of each other.

Below is a detailed discussion of our comments.

A. The diverse nature of livestock production requires clear and simple criteria for source determinations.

As noted in the introductory statements, the process of livestock production often occurs across several farms and locations, and the ownership of these sites may vary significantly. The variability in the ownership and proximity of livestock production and its supporting facilities is staggering. Furthermore, the various stages of growth and development in the animal production cycle, such as farrowing, weaning and growing or finishing, may each occur on separate farms. Some of these farms may be down the road from each other. Some may be dozens of miles away. Some may be owned by the same families or businesses. Some may be operated by contract operators. Those contracts may be exclusive, or an operator may serve multiple farmers. The contracts are often short term, but many can be longer term.

Some farms may have their own feed mills. Other farms may be served by a common feed mill that may or may not be co-located at a site that has some aspects of animal production on it. Supporting operations such as manure management facilities may be on the same site as livestock production, or they may be on separate sites several miles away. The permutations are endless, and the degree of functional interrelatedness among these sites cannot be easily categorized. The common-sense notion of a plant, as discussed by the DC Court of Appeals in *Alabama Power v. Costle*[1], most likely does not exist in the form of the modern livestock production process. Instead, the common-sense notion of a livestock farm is more likely a single site with several barns carrying out their discrete function in the overall livestock production process.

As a result, if source determinations for the livestock sector involve subjective criteria such as whether functional interrelatedness exists between two sites, then farmers will be subject to great uncertainty and inconsistency as state permitting agencies struggle with source determinations. Farmers who might be required to obtain air permits will be subject to delay and unpredictability while state agencies wrestle with the subjectivity of the criteria and the variability of the physical and business relationships among farm operations.

Consequently, it is imperative for EPA's rules and guidance to provide clear and simple criteria, based on reasonable interpretations of the Clean Air Act and its regulations, so that permitting agencies and farmers may have more consistent and predictable application of air permitting programs. As the comments below will demonstrate, we believe guidance which interprets the term "adjacent" to mean physical proximity and guidance which accounts for functional interrelatedness through the existing criteria of "same industrial grouping" (same 2-digit SIC code or support facility) is the most sensible approach.

B. EPA is correctly limiting the meaning of the term "adjacent" to mean physical proximity, based on Clean Air Act definitions, court rulings, EPA's historical interpretations, and the plain meaning of the word.

[1] 636 F.2d 323 (1979)

The Clean Air Act contains several definitions of "source" and its derivatives. These definitions essentially serve the same purpose of defining the collection of emitting activities that should be grouped together for permitting or emission control programs, or both. These definitions focus on two criteria: whether the facilities operate under common control, **and** whether they are contiguous (meaning the properties touch).

None of those definitions include the term "adjacent" to describe the geographical or physical proximity of the collection of activities. The Title III definition of major source[2], the Title V definition of major source[3], and the various definitions of major source for the 1990 nonattainment area classifications[4] define major source using only the words "contiguous area" to describe the geographical relationship between activities. The choice of the words "contiguous area" strongly suggest Congress meant the facilities must be on contiguous properties or at the very least within close physical proximity. Furthermore, there is no hint in these definitions that contiguousness includes the concept of functional interrelatedness.

Although Congress did not define major source or major modification to include the concept of contiguousness or adjacency for purposes of the PSD or Nonattainment NSR programs, EPA included those terms in the regulatory definitions to draw reasonable lines around which activities should be combined under the umbrella of a single source. EPA drew its guidance from the *Alabama Power* court, which instructed EPA to develop regulations which allow aggregation of activities based on proximity and ownership[5]. There is nothing in the *Alabama Power* ruling which suggests the court believed anything other than ownership or the physical proximity of the activities were relevant to the question of combining the activities into a single source.

EPA's proposed interpretation that adjacent requires physical proximity also follows the decision of the 6th Circuit Court of Appeals in the *Summit Petroleum*[6] ruling. The 6th Circuit found that EPA had incorrectly injected a functional relationship test into the evaluation of whether two sources were adjacent under the Title V definition of major source.

The court found that EPA's interpretation of the term adjacent, by imposing functional relationship into the interpretation, ran contrary to the plain meaning of the term.

> *Here, we conclude that the EPA's interpretation of the requirement that activities be "located on contiguous or adjacent properties," i.e., that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity.*[7]

Finally, EPA's use of the term "adjacency" to capture the concept of "touching or in close proximity" is appropriate because it adheres to the common sense, plain English definition of "adjacent". In this context, the word "adjacent" has only a geographical proximity connotation, and the concept of functional interrelatedness is not relevant.

Merriam-Webster's online dictionary, merriam-webster.com, defines adjacent as[8]:

> **a :** not distant **:** nearby the city and *adjacent* suburbs

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[2] Definition of "major source" for purposes of Title III, 42 U.S.C. 7412(a)(1)
[3] Definition of "major source" for purposes of Title V, 42 U.S.C. 7661(2)
[4] See 42 U.S.C 7611a
[5] Alabama Power v. Costle, 636 F.2d 323, 397
[6] Summit Petroleum Corp. v. United States Environmental Protection Agency, 690 F.3d 733 (6th Cir. 2012)
[7] Id., at 744.
[8] https://www.merriam-webster.com/dictionary/adjacent, URL last visited October 2, 2018.

b : having a common endpoint or border *adjacent* lots *adjacent* sides of a triangle
c : immediately preceding or following

Similarly, dictionary.com defines adjacent as[9]:

1. lying near, close, or contiguous; adjoining; neighboring: a motel adjacent to the highway.
2. just before, after, or facing: a map on an adjacent page.

As illustrated by both definitions, "adjacent" means close geographical proximity. Neither of these definitions describe adjacent in terms of some kind of functional relationship between the nearby entities. Consequently, the determination whether emission sources are adjacent for purposes of Clean Air Act program should focus only on the geographical relationship. The operative question should be: Are the facilities in close enough proximity that common sense would define them as a single source? If the sources are further away than sharing borders or within easily visible range, then they can't be adjacent, regardless of the functional relationship of the facilities. The facilities aren't physically close enough to fall within the common-sense notion of a single plant.

For this reason, we support EPA's interpretation of adjacent that is based solely on physical proximity.

C. There is no need to include the concept of functional interrelatedness into the adjacency criteria because the criteria of "same industrial grouping" (same 2-digit SIC code/support facility) provides a simple means of evaluating functional relationship between sources, and the SIC code/support facility relationship should be the only criteria used to assess the functional interrelatedness of sources.

EPA has already addressed the concept of functional interrelatedness in the definitions of source when it established the criteria that sources must be in the same 2-digit SIC code (or a support facility) to be aggregated as a common source. The 2-digit SIC code provides a simple and predictable means of identifying which facilities are functionally related and, therefore, candidates for grouping together if the sources are under common ownership/control and close in proximity.

The *Alabama Power* court emphasized to EPA in 1979 that operations should be aggregated as a single source, using factors such as proximity and ownership. EPA in turn converted the court's guidance into the three factors used in today's source determinations (common ownership/control, same 2-digit SIC code/support facility, and contiguous/adjacent), and the agency asserted the rules comport with the common-sense notion of a plant.

In the preamble to the August 7, 1980, final NSR rules, EPA clearly stated its preference for using the 2-digit SIC code over abstract criteria such as the functional relationship[10].

> *In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities based on their functional interrelationships. While EPA sough to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.*

[9] https://www.dictionary.com/browse/adjacent?s=t?s=t, URL last visited October 2, 2018
[10] 45 FR 52695

Using the 2-digit SIC Code provides a simple means of assessing the functional relationship between sources to determine if the facilities meet the common-sense notion of a plant. Conversely, the functional relationship between two sources has no place in the determination of whether two sources are physically contiguous or adjacent. Furthermore, the concept of functional interrelatedness utilizes no physical limitation on how far apart two sources may be. This clearly violates the common-sense notion of a plant mandated in the *Alabama Power* ruling. The terms contiguous and adjacent, in their normal meanings, have no connotation other than geographical or physical proximity.

Furthermore, it makes no sense for EPA to tout the administrative ease and efficiency of the 2-digit SIC Code criteria, then completely undermine it by injecting the functional relationship between sources as part of the assessment of whether the sources are contiguous or adjacent - words that mean physical proximity.

Consequently, we strongly support limiting the evaluation of functional relationship to the 2-digit SIC code provisions already built into the source determination process, and we support limiting the scope of the term adjacent to a specific distance that reflects the concept of physical proximity.

We also believe EPA's initial characterization of the 2-digit SIC code (or alternatively the support facility test) provides the clearest method for assessing the functional relationship between facilities in the assessment of whether the operations comprise a single source. A separate functional interrelatedness test serves no beneficial purpose in the source determination process.

D. EPA should strengthen its draft guidance to clarify that activities separated by more than ¼ mile are not contiguous or adjacent, and therefore not part of the same source.

We urge EPA to add greater clarity to the concept of adjacency by creating a presumption that sources more than ¼ mile apart are not contiguous or adjacent.

A specific distance provides clarity and simplicity in administration. The ¼-mile distance is a reasonable interpretation of the term adjacent and reflects the common-sense notion of what a single plant/facility/farm is.

Further guidance could describe how to evaluate multiple activities in an area. As described earlier in this letter, a livestock production business can consist of multiple farms and other facilities spread about an area. It does not make sense to combine those facilities such that the first and last operations in a chain are separated by a distance that no longer resembles the common-sense notion of a plant. We support the approach used by the state of Louisiana: define the geographical center of the source and exclude those facilities farther than ¼ mile from that geographical center.

Thank you for the opportunity to comment on this important issue with significant implications on livestock producers across the country and to continue our longstanding efforts to work cooperatively with EPA to ensure development of sound policy for all stakeholders. If you have any questions, please do not hesitate to contact the undersigned at (317) 692-7835.

Sincerely,

Justin T. Schneider

B PAUL CONSULTING, LLC
PERMITTING | COMPLIANCE | ADVOCACY

October 4, 2018 ***SUBMITTED VIA ELECTRONIC MAIL***

Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

c/o Adjacency_Guidance@epa.gov

RE: Comments on the Draft US EPA Memorandum "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

B Paul Consulting, LLC is submitting these comments on behalf of our client, the Indiana Pork Advocacy Coalition (INPAC). The INPAC is funded by voluntary contributions from Indiana pork farmers who want their policy interests represented at both the state and national level.

INPAC appreciates the opportunity to offer written comments on the above draft memorandum, published on US EPA's web site on September 4, 2018. INPAC strongly agrees with US EPA that interpretation of "adjacent" should focus solely on geographical proximity when making source determinations under the Clean Air Act permit programs. We also agree with EPA that functional interrelatedness of the facilities is irrelevant for purposes of determining whether facilities are adjacent. The interpretation is both consistent with the terms and definitions in the Clean Air Act, but also consistent with the plain and ordinary meaning of the term.

Our pork producers have a significant interest in the draft memorandum because there is a very large, highly diverse, and unique array of business arrangements in the livestock production sector, which makes it quite distinct from most other business sectors. Because of the general geographic proximity and business of pork producing farms, state permitting agencies which implement current EPA policies can be faced with a variety of complex factors to determine whether the farms should be considered a single production unit, analogous to a single facility or "plant." This would likely lead to inconsistent and unfair applicability of permitting programs among states and perhaps even within states.

With the sheer variety of business and functional relationships among pork production farms, it is imperative EPA develop clear guidance for states to determine whether two or more farms should be aggregated as a single source. In our view, interpreting the term "adjacent' solely to

one of physical proximity is a strong step in right direction. As our comments below show, we believe the guidance could be strengthened by developing a bright line distance which beyond which no two facilities would be considered part of the same source.

Our comments can be summarized as follows:

1. Interpreting the term "adjacent" based on physical or geographical proximity is the most objective and reasonable approach to determining whether two or more facilities should be aggregated as one common source. Excluding the concept of "functional interrelatedness" from the question of whether facilities are part of the same source eliminates complexity, confusion, and opportunity for inconsistent application of the interpretation. Furthermore, an interpretation based on physical proximity follows the definitions in the Clean Air Act, court rulings, EPA's historical intent, and the ordinary meaning of the term adjacent.
2. There is no need to insert the concept of functional interrelatedness into the determination of contiguous or adjacent because the concept is addressed in a simple and clear manner in one of the other criteria in the 3-prong test for source determinations. The criteria of "same industrial grouping" (same 2-digit SIC code or support facility), provides a simple means of evaluating functional relationship between sources, and should be the only criteria used to assess the functional interrelatedness of sources.
3. We support strengthening the draft guidance by defining adjacency to exclude any pollutant emitting activities under common ownership or common control which are taking place more than ¼ mile of each other.

Below is a detailed discussion of our comments.

A. The diverse nature of pork production requires clear and simple criteria for source determinations.

As noted in the introductory statements, the process of pork production often occurs across several farms and locations, and the ownership of these sites may vary significantly. The variability in the ownership and proximity of pork production and its supporting facilities is staggering. Furthermore, the various stages of growth and development in the production cycle, such as farrowing, weaning and growing or finishing, may each occur on separate farms. Some of these farms may be down the road from each other. Some may be dozens of miles away. Some may be owned by the same families or businesses. Some may be operated by contract operators. Those contracts may be exclusive, or an operator may serve multiple farmers. The contracts are often short term, but many can be longer term. Some farms may have their own feed mills. Other farms may be served by a common feed mill that may or may not be co-located at a site that has some aspects of animal production on it. Supporting operations such as manure management facilities may be on the same site as livestock production, or they may be on separate sites several miles away. The permutations are endless,

and the degree of functional interrelatedness among these sites cannot be easily categorized. The common-sense notion of a plant, as discussed by the DC Court of Appeals in *Alabama Power v. Costle*[1], most likely does not exist in the form of the modern livestock production process. Instead, the common-sense notion of a livestock farm is more likely a single site with several barns carrying out their discrete function in the overall livestock production process.

As a result, if source determinations for the livestock sector involve subjective criteria such as whether functional interrelatedness exists between two sites, then pork producing farms will be subject to great uncertainty and inconsistency as state permitting agencies struggle with source determinations. Farmers who might be required to obtain air permits will be subject to delay and unpredictability while state agencies wrestle with the subjectivity of the criteria and the variability of the physical and business relationships among farm operations.

Consequently, it is imperative for EPA's rules and guidance to provide clear and simple criteria, based on reasonable interpretations of the Clean Air Act and its regulations, so that permitting agencies and farmers may have more consistent and predictable application of air permitting programs. As the comments below will demonstrate, we believe guidance which interprets the term "adjacent" to mean physical proximity and guidance which accounts for functional interrelatedness through the existing criteria of "same industrial grouping" (same 2-digit SIC code or support facility) is the most sensible approach.

B. EPA is correctly limiting the meaning of the term "adjacent" to mean physical proximity, based on Clean Air Act definitions, court rulings, EPA's historical interpretations, and the plain meaning of the word.

The Clean Air Act contains several definitions of "source" and its derivatives. These definitions essentially serve the same purpose of defining the collection of emitting activities that should be grouped together for permitting or emission control programs, or both. These definitions focus on two criteria: whether the facilities operate under common control, **and** whether they are contiguous (meaning the properties touch).

None of those definitions include the term "adjacent" to describe the geographical or physical proximity of the collection of activities. The Title III definition of major source[2], the Title V definition of major source[3], and the various definitions of major source for the 1990 nonattainment area classifications[4] define major source using only the words "contiguous area" to describe the geographical relationship between activities. The choice of the words "contiguous area" strongly suggest Congress meant the facilities must be on contiguous

[1] 636 F.2d 323 (1979)
[2] Definition of "major source" for purposes of Title III, 42 U.S.C. 7412(a)(1)
[3] Definition of "major source" for purposes of Title V, 42 U.S.C. 7661(2)
[4] See 42 U.S.C 7611a

properties or at the very least within close physical proximity. Furthermore, there is no hint in these definitions that contiguousness includes the concept of functional interrelatedness.

Although Congress did not define major source or major modification to include the concept of contiguousness or adjacency for purposes of the PSD or Nonattainment NSR programs, EPA included those terms in the regulatory definitions to draw reasonable lines around which activities should be combined under the umbrella of a single source. EPA drew its guidance from the *Alabama Power* court, which instructed EPA to develop regulations which allow aggregation of activities based on proximity and ownership[5]. There is nothing in the *Alabama Power* ruling which suggests the court believed anything other than ownership or the physical proximity of the activities were relevant to the question of combining the activities into a single source.

EPA's proposed interpretation that adjacent requires physical proximity also follows the decision of the 6th Circuit Court of Appeals determination in the *Summit Petroleum*[6] ruling. The 6th Circuit found that EPA had incorrectly injected a functional relationship test into the evaluation of whether two sources were adjacent under the Title V definition of major source.

The court found that EPA's interpretation of the term adjacent, by imposing functional relationship into the interpretation, ran contrary to the plain meaning of the term.

> *Here, we conclude that the EPA's interpretation of the requirement that activities be "located on contiguous or adjacent properties," i.e., that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity.*[7]

Finally, EPA's use of the term "adjacency" to capture the concept of "touching or in close proximity" is appropriate because it adheres to the common sense, plain English definition of "adjacent". In this context, the word "adjacent" has only a geographical proximity connotation, and the concept of functional interrelatedness is not relevant.

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> **a :** not distant **:** NEARBY the city and *adjacent* suburbs
> **b :** having a common endpoint or border *adjacent* lots *adjacent* sides of a triangle
> **c :** immediately preceding or following

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[5] Alabama Power v. Costle, 636 F.2d 323, 397
[6] Summit Petroleum Corp. v. United States Environmental Protection Agency, 690 F.3d 733 (6th Cir. 2012)
[7] Id., at 744.
[8] https://www.merriam-webster.com/dictionary/adjacent, URL last visited October 2, 2018.

Similarly, dictionary.com defines adjacent as[9]:

> *1. lying near, close, or contiguous; adjoining; neighboring: a motel adjacent to the highway.*
>
> *2. just before, after, or facing: a map on an adjacent page.*

As illustrated by both definitions, "adjacent" means close geographical proximity. Neither of these definitions describe adjacent in terms of some kind of functional relationship between the nearby entities.

Consequently, the determination whether emission sources are adjacent for purposes of Clean Air Act program should focus only on the geographical relationship. The operative question should be: Are the facilities in close enough proximity that common sense would define them as a single source? If the sources are further away than sharing borders or within easily visible range, then they can't be adjacent, regardless of the functional relationship of the facilities. The facilities aren't physically close enough to fall within the common-sense notion of a single plant.

For this reason, we support we support EPA's interpretation of adjacent that is based solely on physical proximity.

C. There is no need to include the concept of functional interrelatedness into the adjacency criteria because the criteria of "same industrial grouping" (same 2-digit SIC code/support facility) provides a simple means of evaluating functional relationship between sources, and the SIC code/support facility relationship should be the only criteria used to assess the functional interrelatedness of sources.

EPA has already addressed the concept of functional interrelatedness in the definitions of source when it established the criteria that sources must be in the same 2-digit SIC code (or a support facility) to be aggregated as a common source. The 2-digit SIC code provides a simple and predictable means of identifying which facilities are functionally related and, therefore, candidates for grouping together if the sources are under common ownership/control and close in proximity.

The *Alabama Power* court emphasized to EPA in 1979 that operations should be aggregated as a single source, using factors such as proximity and ownership. EPA in turn converted the court's guidance into the three factors used in today's source determinations (common ownership/control, same 2-digit SIC code/support facility, and contiguous/adjacent), and the agency asserted the rules comport with the common-sense notion of a plant.

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[9] https://www.dictionary.com/browse/adjacent?s=t?s=t, URL last visited October 2, 2018

In the preamble to the August 7, 1980, final NSR rules, EPA clearly stated its preference for using the 2-digit SIC code over abstract criteria such as the functional relationship[10].

> *In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities based on their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.*

Using the 2-digit SIC Code provides a simple means of assessing the functional relationship between sources to determine if the facilities meet the common-sense notion of a plant. Conversely, the functional relationship between two sources has no place in the determination of whether two sources are physically contiguous or adjacent. Furthermore, the concept of functional interrelatedness utilizes no physical limitation on how far apart two sources may be. This clearly violates the common-sense notion of a plant mandated in the *Alabama Power* ruling. The terms contiguous and adjacent, in their normal meanings, have no connotation other than geographical or physical proximity.

Furthermore, it makes no sense for EPA to tout the administrative ease and efficiency of the 2-digit SIC Code criteria, then completely undermine it by injecting the functional relationship between sources as part of the assessment of whether the sources are contiguous or adjacent - words that mean physical proximity.

Consequently, we strongly support limiting the evaluation of functional relationship to the 2-digit SIC code provisions already built into the source determination process, and we support limiting the scope of the term adjacent to a specific distance that reflects the concept of physical proximity.

We also believe EPA's initial characterization of the 2-digit SIC code (or alternatively the support facility test) provides the clearest method for assessing the functional relationship between facilities in the assessment of whether the operations comprise a single source. A separate

[10] 45 FR 52695

functional interrelatedness test serves no beneficial purpose in the source determination process.

D. EPA should strengthen its draft guidance to clarify that activities separated by more than ¼ mile are not contiguous or adjacent, and therefore not part of the same source.

We urge EPA to add greater clarity to the concept of adjacency by creating a presumption that sources more than ¼ mile apart are not contiguous or adjacent.

A specific distance provides clarity and simplicity in administration. The ¼-mile distance is a reasonable interpretation of the term adjacent and reflects the common-sense notion of what a single plant/facility/farm is.

Further guidance could describe how to evaluate multiple activities in an area. As described earlier in this letter, a pork production business can consist of multiple farms and other facilities spread about an area. It does not make sense to combine those facilities such that the first and last operations in a chain are separated by a distance that no longer resembles the common-sense notion of a plant. We support the approach used by the state of Louisiana: define the geographical center of the source and exclude those facilities farther than ¼ mile from that geographical center.

Thank you for the opportunity to comment on this important issue with significant implications on livestock producers across the country and to continue our longstanding efforts to work cooperatively with EPA to ensure development of sound policy for all stakeholders. If you have any questions, please do not hesitate to contact Bernie Paul at 317-344-9730.

Sincerely,

Bernie Paul
President, B Paul Consulting, LLC

KEAN | MILLER LLP
ATTORNEYS AT LAW

TOKESHA M. COLLINS-WRIGHT, PARTNER
PHONE: 225.382.3426 DIRECT FAX: 225.215.4183
TOKESHA.COLLINS-WRIGHT@KEANMILLER.COM

October 5, 2018

Submitted via Email at Adjacency_Guidance@epa.gov

RE: Louisiana Chemical Association
Comments on Draft ***Guidance Interpreting "Adjacent" for Source Determinations***
Our File No.: 3645-375

Dear Sir or Madam:

On behalf of our client, the Louisiana Chemical Association ("LCA"), we are submitting the following comments for the Environmental Protection Agency's ("EPA" or the "Agency") consideration concerning the Agency's draft guidance titled, "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas" (the "Draft Guidance"). The purpose of the Draft Guidance is to provide EPA's interpretation of and provide assistance to permitting authorities in determining the scope and extent of a "stationary source" for the New Source Review ("NSR") pre-construction permit programs under title I of the Clean Air Act ("CAA") and the scope and extent of a "major source" for the title V operating permit program. EPA acknowledges that, among both the regulated community and permitting authorities, there is uncertainty regarding the meaning of the term "adjacent," as that term is used in the relevant definitions in EPA's NSR and title V regulations. To promote clarity, EPA is providing its interpretation of the term "adjacent," as used in the NSR and title V regulations. This Draft Guidance describes how EPA interprets "adjacent" for all industrial categories except for oil and natural gas activities covered by Standard Industrial Classification ("SIC") major group 13.

The Louisiana Chemical Association ("LCA") is a nonprofit Louisiana corporation composed of 71 member companies with over 90 chemical manufacturing plant sites in Louisiana.[1] LCA was organized to represent the interests of the chemical manufacturing industry in Louisiana. LCA members employ over 24,000 persons in Louisiana, who not only work in the communities their companies call home – they live there, too. Many of LCA's member companies own and operate facilities categorized as "stationary sources" and "major sources" for the purposes of the NSR and title V programs, and therefore, will be affected by the Draft Guidance.

1. Introduction

LCA appreciates the opportunity to provide comments on the Draft Guidance and recognizes that a significant effort has been expended by EPA in developing this guidance document. In general, LCA supports the Agency's attempts to provide clarity and certainty to this matter, as there has long been uncertainty regarding the meaning of the term "adjacent" under the title V and NSR programs due to

[1] A membership list is attached as Exhibit 1.

T 225.387.0999 | F 225.388.9133
II City Plaza | 400 Convention Street Suite 700 | Baton Rouge, LA 70802
Post Office Box 3513 | Baton Rouge, LA 70821
keanmiller.com

court decisions and resultant EPA guidance. LCA agrees with EPA's decision to reject consideration of the concept of "functional interrelatedness" when determining whether sources are "adjacent." As noted by the Sixth Circuit in *Summit Petroleum Corp. v. Environmental Protection Agency*,[2] EPA's past consideration of functional interrelationship "...is in practice completely inconsistent with the wording of [EPA's] own regulation," as the term "adjacent" unambiguously related to "geographic, rather than operational, terms."[3] The court continued, "EPA makes an impermissible and illogical stretch when it states that one must ask the *purpose* for which two activities exist in order to consider whether they are adjacent to one another."[4] As such, EPA cannot reasonably interpret its regulations and the phrase "contiguous or adjacent properties" to include a test of functional interrelationship. Because EPA's prior applicability determinations and guidance and statements inexplicably strayed from this unambiguous meaning, LCA supports the Draft Guidance's interpretation of "adjacent" as meaning "physical proximity" for the purposes of the NSR and title V programs.

Further, LCA adopts the comments of the American Petroleum Institute ("API") regarding the Draft Guidance. LCA also supports the additional changes to the Draft Guidance that are recommended by API. LCA believes that these changes would strengthen the Draft Guidance.

2. Legal and Regulatory Background

Under the CAA, the term "stationary source" is defined in EPA's regulations under the NSR and prevention of significant deterioration ("PSD") permitting programs. In these regulations, the term "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." 40 C.F.R. §§ 51.165(a)(1)(i) and 52.21(b)(5). The phrase "building, structure, facility, or installation" is defined as all pollutant-emitting activities that: (1) belong to the same industrial grouping; and (2) are located on one or more "contiguous or adjacent" properties; and (3) are under the control of the same person. 40 C.F.R. §§ 51.165(a)(1)(ii)(A) and 52.21(b)(6)(i). All three criteria must be met to determine that a single source designation is appropriate.

The definition of "major source" under the title V permitting program refers to the definitions in other sections of the CAA, including the definition of major source for hazardous air pollutants (CAA section 112, 42 U.S.C. § 7412), the general CAA definition of major stationary source (CAA section 302, 42 U.S.C. § 7602), and the definition of major stationary source under the nonattainment NSR ("NNSR") program. Each of these programs have different numerical emissions thresholds at which requirements apply, with these thresholds being the basis for the major source determination in the title V program. EPA's operating permit regulations define "major source" as "any stationary source (or group of stationary sources) that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping..." 40 C.F.R. § 70.2. As with the NSR and PSD programs, EPA defined "major industrial grouping" to refer to the Major Group, two-digit SIC code. Also as with the NSR and PSD programs, all three criteria must be met to determine that a single source designation is appropriate.

Under the CAA, the term "stationary source" is defined in EPA's regulations under the NSR and prevention of significant deterioration ("PSD") permitting programs. In these regulations, the term

[2] 690 F.3d 733 (6th Cir. 2012).
[3] *Id.* at 748.
[4] *Id.* at 742 (italics in original).

"stationary source" is defined as "any building, structure, facility, or installation which emits or may emit a regulated [NSR] pollutant." *See* 40 C.F.R. §§ 51.165(a)(1)(i), 52.21(b)(5), and § 70.2. The phrase "building, structure, facility, or installation" is defined as all pollutant-emitting activities that: (1) belong to the same industrial grouping; and (2) are located on one or more "contiguous or adjacent" properties; and (3) are under the control of the same person. *See* 40 C.F.R. §§ 51.165(a)(1)(ii)(A), 52.21(b)(6)(i), and § 70.2. All three criteria must be met to determine that a single source designation is appropriate.

In 1980, EPA revised its PSD regulations in response to *Alabama Power Co. v. Costle*, 636 F. 2d 323, 397 (D.C. Cir. 1979)).[5] When the Agency initially adopted the three-part single source test, EPA stated that the test would satisfy the *Alabama Power* court decision by reasonably comporting with the "common sense notion of a plant," and by avoiding the aggregation of pollutant-emitting activities that would not fit within the ordinary meaning of "building, structure, facility or installation."[6] However, the Agency also explained it could not "say precisely how far apart activities must be in order to be treated separately" and such determinations would be made on a "case-by-case" basis.[7] EPA also considered, but chose not to add, a "functional interrelationship" factor or test to the criteria for defining a source, as at that time the Agency believed that such a test would have "embroiled the agency in numerous, fine-grained analyses."[8]

Regardless, for many years afterwards, the EPA did argue that "functional interrelatedness," and not just physical proximity, should be considered when determining whether two facilities are "adjacent."[9] In the 2012 decision *Summit Petroleum Corp. v. Environmental Protection Agency*,[10] the Sixth Circuit rejected the EPA approach of using functional interrelatedness when determining whether two facilities are "adjacent." Summit Petroleum determined an oil and gas sweetening plant and related wells, which were located 8 miles apart, were a single source for Title V purposes. The Sixth Circuit found the term "adjacent" was unambiguous, and the plain meaning of the term meant physical proximity only and not "functional interrelatedness." The Court vacated and remanded the EPA's determination that the sweetening plant and the wells were a single source.

In response to *Summit Petroleum*, EPA issued the "Summit Directive" in December 2012, a memorandum explaining that the court decision's impact would be limited to sources in the Sixth Circuit only, and that the Agency would still be considering functional interrelatedness in permitting actions in other jurisdictions.[11] In 2014's *National Environmental Development Association's Clean Air*

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[5] In *Alabama Power*, the D.C. Circuit held that EPA could not treat contiguous and commonly owned units as a single source unless they "fit within the four statutory terms" (*i.e.*, the terms "building," "structure," "facility," and "installation"). The court further stated that the Agency should "provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership." *Id.* at 397.

[6] 45 Fed. Reg. 52676, 52694 (Aug. 7, 1980).

[7] *Id.* at 52695.

[8] *Id.* at 52695.

[9] See, for example, Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Steve Rothblatt, Chief, Air Programs Branch Region 5, PSD Definition of Source (June 30, 1981) (the "1981 Reich Memorandum"); Memorandum from William L. Wehrum, Acting Assistant Administrator, to Regional Administrators 1-10, Source Determinations for Oil and Gas Industries (Jan. 12, 2007) (the "2007 Wehrum Memorandum"); Memorandum from Gina McCarthy, Assistant Administrator, to Regional Administrators 1-10, Withdrawal of Source Determinations for Oil and Gas Industries (September 22, 2009)(the "2009 McCarthy Memorandum").

[10] 690 F.3d 733 (6th Cir. 2012).

[11] Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors 1-10, Applicability of the Summit Decision to EPA Title V and NSR Source Determinations (December 21, 2012).

Project v. Environmental Protection Agency,[12] the D.C. Circuit held that the EPA's failure to comply with its own "Regional Consistency" regulations with respect to the Summit Directive was arbitrary and capricious, vacating the Summit Directive. The court found that the memorandum established inconsistent permit criteria in different parts of the country, which conflicted with EPA regulations that promote uniform national regulatory policies.[13] EPA later revised its Regional Consistency regulation, allowing a regional office to diverge from national policy in geographic areas covered by adverse court decisions.[14] Accordingly, until the issuance of the Guidance Document, the Summit Petroleum approach applied only in the Sixth Circuit.

3. LCA Supports EPA's Interpretation that "Adjacent" Means "Physical Proximity" for the Purposes of the NSR, PSD, and Title V Programs

As stated above, the second criterion of the "building, structure, facility, or installation" definition requires that pollutant-emitting activities be located on one or more contiguous or adjacent properties.[15] The Draft Guidance affirms that the term "adjacent" means physical proximity, not functional interrelatedness. This interpretation follows both applicable case law and EPA's express language in the 1980 PSD amendments. In the preamble to the 1980 final rule amending the PSD regulations, EPA made it quite clear that, with respect to the second criterion, the "clause embodied, of grouping pollutant-emitting activities solely on the basis of proximity..."[16] EPA rejected using "functional interrelationships" as a consideration into the concept of "adjacency" because, among other things, the assessment of "functional interrelationships would be *highly subjective*."[17] Inexplicably, subsequent EPA guidance rejected this express language and did use "functional interrelatedness" as a factor in determining "adjacency." In the 1981 Reich Memorandum, 2007 Wehrum Memorandum, and 2009 McCarthy Memorandum, among other guidance documents, EPA maintained a policy that "adjacent" could include consideration of functional interrelationships. However, in 1980, EPA stated that consideration of functional interrelationships would make applicability determinations "substantially more difficult," "would reduce[ ] ... predictability," would add "subjectiv[eness]," and "would have embroiled the Agency in numerous, fine-grained analyses."[18] Instead, the Agency stated that it would use Standard Industrial Classifications ("SIC") codes as the means for "distinguishing between sets of activities on the basis of their functional interrelationships."[19] In issuing the various subsequent memoranda, EPA never explained why it reversed course from its 1980 decision nor why the "same industrial grouping" (i.e., the first criterion in the "building, structure, facility, or installation" definition) no longer adequately addressed the issue of functional interrelationships in single source determinations. The 1980 PSD rule has not been modified with respect to the issue of single source determinations, and the Draft Guidance merely reaffirms the principle that focusing exclusively on "physical proximity" when considering whether or not operations are adjacent is a reasonable approach that is consistent with the dictionary meaning of "adjacent," the common sense notion of a plant, and the original intent expressed in the early development of the EPA permitting programs.

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[12] 752 F.3d 999 (D.C. Cir. 2014).
[13] *Id.* at 1009.
[14] 81 Fed. Reg. 51102 (Aug.3, 2016).
[15] *See* 40 C.F.R. §§ 51.165(a)(1)(ii)(A), 52.21(b)(6)(i), and 70.2.
[16] 45 Fed. Reg. at 52693.
[17] 45 Fed. Reg. at 52695 (emphasis added).
[18] 45 Fed. Reg. at 52695.
[19] *Id.*

4. LCA Supports EPA's Decision Not to Establish a Bright-Line Within Which Pollutant-Emitting Activities Shall Be Deemed to be in Physical Proximity and, thus, "Adjacent"

In the Draft Guidance, EPA states that it will not "establish[] a 'bright line,' or specify[]a fixed distance, within which two or more operations[20] will be deemed to be in physical proximity and, thus, 'adjacent.'"[21] LCA supports this decision to not set a "bright-line" distance for which pollutant-emitting activities are deemed to be in physical proximity and, thus, adjacent. LCA also agrees that the terms "proximity" and "adjacent" mean "nearby" or "side-by-side or neighboring."[22]

5. LCA believes the Final Guidance Document Should Address the Phrase "Contiguous or Adjacent" Properties

In the Draft Guidance, EPA states that, in the past, "[b]ased on … dictionary definitions, EPA has interpreted 'contiguous' to mean that parcels of land associated with the operations in question are in physical contact with one another."[23] However, the text of the Draft Guidance indicates that EPA is not reaffirming its interpretation of "contiguous" in this document, even though the second criterion of the "building, structure, facility, or installation" definition references both the terms "contiguous" and "adjacent." Instead, EPA simply rationalizes that each term must be given independent meaning so as not to "render the term 'adjacent' superfluous."[24] However, this position is inconsistent with the one taken by EPA in 1993 when the Agency decided to define the term "major source" for the purposes of the national emission standards for hazardous air pollutants ("NESHAP") for source categories being promulgated pursuant to Section 112 of the CAA.

In the 1993 proposal, EPA determined that "Congress intended the term 'contiguous area,' as it used to define major source in section 112, to have the same meaning as the term 'contiguous or adjacent property' *(sic)* as it is used in section § 70.2 of the promulgated part 70 permit program regulation."[25] Accordingly, it would not be inconsistent for EPA here to reaffirm the meaning of the phrase "contiguous or adjacent properties" rather than focusing the guidance only on the term "adjacent." LCA believes such an approach could serve to prevent any future interpretations of "contiguous" that are inconsistent with the understanding that EPA currently has of the term and to prevent any future attempts to reintroduce the concept of "functional interrelatedness" into the meaning of the phrase "contiguous or adjacent properties."

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[20] LCA notes that, throughout the Draft Guidance document, EPA uses the word "operations" interchangeably with the phrase "pollutant-emitting activities." The definitions of "stationary source" and "major sources" under the title V, NSR, and PSD programs refer to "pollutant-emitting activities," not "operations." LCA believes that EPA should use more precise language in the final Guidance, and the final Guidance should be revised to use the actual language in the definitions of "stationary source" and "major source."

[21] Draft Guidance, at p. 7.

[22] Draft Guidance, at p. 7.

[23] Draft Guidance, at p. 4.

[24] Draft Guidance, at p. 7.

[25] 58 Fed. Reg. 42760, 42767 (Aug. 11, 1993).

LCA appreciates the opportunity to submit these comments. If you have any questions concerning these comments, please contact me at the email or direct dial listed above, or contact Henry Graham, Jr., of LCA, at Henry@lca.org.

Very truly yours,

Tokesha M. Collins-Wright

TCW/cfw
cc: Henry Graham, Jr., P.E.

Exhibit 1 to LCA Comments on EPA's Draft Guidance Interpreting "Adjacent" for Source Determinations

Air Liquide Large Industries U.S. LP
Air Products & Chemicals Inc
Air Products & Chemicals Inc - La Operations
Albemarle Corporation
Americas Styrenics LLC
Arkema Inc.
BASF Corporation
BioLab Inc, A KIK Company
Birla Carbon
Cabot Corporation
Calumet Specialty Products Partners L.P.
Catalyst Recovery of Louisiana, LLC
CF Industries Nitrogen Inc
Chemtrade Refinery Services Inc
Chevron Oronite Company, LLC
CITGO Lake Charles Manufacturing Complex
Cornerstone Chemical Company
Denka
Dexco Polymers L.P.
Dow Chemical Company
DOW Chemical Company-Amerchol
DuPont
Eastman Chemical Company
ExxonMobil Chemical Company
Formosa Plastics Corporation, Louisiana
Galata Chemicals
Grace
Hexion Inc.
Honeywell International, Inc.
Honeywell UOP
Ineos Oxide
Ingevity South Carolina LLC
Innophos Inc Lion Elastomers LLC
Lion Elastomers LLC
Lonza
Louisiana Pigment Company, L.P.
LyondellBasell Industries
Methanex
Monsanto Company
Mosaic Fertilizer LLC
Nalco Champion An Ecolab Company
Noranda Bauxite & Alumina

Nova Chemicals Olefins LLC
Nutrien
Occidental Chemical Corporation
Olin Blue Cube Operations, LLC
Olin Chlor Alkali Products
Oxbow Calcining
PCS Nitrogen Fertilizer, L.P.
PQ Corporation
Praxair - Geismar
Praxair, Westlake
Rain CII Carbon LLC
Reagent Chemical & Research, Inc
Rubicon LLC
Sasol Chemicals (USA) LLC
Shell Chemical Company LP
Shintech Louisiana, LLC
Sid Richardson Carbon Co.
SNF Flopam
Solvay
Southern Ionics Incorporated
Syngenta Crop Protection, LLC
Total Petrochemicals and Refining USA, Inc
Veolia Regeneration Services
Wanhua Chemical US Holding Inc
Westlake Chemical Corporation
Westlake - Lake Charles
Westlake - Plaquemine
Westlake Vinyls
YCI Methanol One, LLC

Environmental Protection Agency
1200 Pennsylvania Avenue NW.
Washington, DC 20460

October 5, 2018

c/o Adjacency_Guidance@epa.gov

RE: Comments on the Draft U.S. EPA Memorandum "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

The undersigned national livestock and farm organizations appreciate the opportunity to offer written comments on the above draft memorandum, published on U.S. EPA's website on September 4, 2018. We strongly agree with U.S. EPA that interpretation of "adjacent" should focus solely on geographical proximity when making source determinations under the Clean Air Act permit programs and that functional interrelatedness of the facilities is irrelevant for purposes of determining whether facilities are "adjacent". This interpretation is both consistent with the terms and definitions in the Clean Air Act and with the plain and ordinary meaning of the term.

The National Pork Producers Council (NPPC) is an association of 42 state pork producer organizations that serves as the global voice for the nation's pork producers. The U.S. pork industry represents a significant value-added activity in the agriculture economy and the overall U.S. economy. Nationwide, more than 60,000 pork producers marketed more than 120 million hogs in 2017, and those animals provided total gross receipts of more than $20 billion. Overall, an estimated $23 billion of personal income and $39 billion of gross national product are supported by the U.S. pork industry. Economists Daniel Otto, Lee Schulz and Mark Imerman at Iowa State University estimate that the U.S. pork industry is directly responsible for the creation of nearly 37,000 full-time equivalent pork-producing jobs and generates about 128,000 jobs in the rest of agriculture. It is responsible for approximately 102,000 jobs in the manufacturing sector, mostly in the packing industry, and 65,000 jobs in professional services such as veterinarians, real estate agents and bankers. All told, the U.S. pork industry helps support more than 550,000 mostly rural jobs in the United States.

The American Farm Bureau Federation is the country's largest general farm organization, with nearly 6 million member families and representing nearly every type of crop and livestock production across all 50 states and Puerto Rico.

The National Cattlemen's Beef Association (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through state affiliates and members, NCBA represents America's cattle farmers and ranchers who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

Since 1929, the National Council of Farmer Cooperatives(NCFC) has been the voice of America's farmer-owned cooperatives. NCFC values farmer ownership and control in the

production and distribution chain; the economic viability of farmers and the businesses they own; stewardship of natural resources; and vibrant rural communities. Farmer-owned cooperatives span the country, supply nearly any agricultural input imaginable, provide credit and related financial services (including export financing), and market a wide range of commodities and value added products. Earnings from these activities are returned to their farmer members on a patronage basis, helping to improve their income from the marketplace. These earnings are then recycled through rural communities as farmers and ranchers purchase goods and services from local businesses, thereby sustaining rural America.

United Egg Producers (UEP) is a cooperative of U.S. egg farmers working collaboratively to address legislative, regulatory and advocacy issues impacting the industry through active farmer-member leadership, a unified voice and partnership across the agriculture community. Formed in 1968, UEP members represent more than 90 percent of U.S. egg production. Our industry is important to national, state, and local economies, supplying more than 265 eggs per year to each of the nation's residents. Companies involved in the production and processing of eggs provide 81,515 jobs that pay $4.99 billion in wages to families throughout the country, generate over $22.77 billion in annual economic activity, and about $1.78 billion in government revenue. UEP's farmer-members work to provide for the health and well-being of their birds; to produce safe, nutritious, high-quality eggs; and to manage their farms responsibly with best on-farm management practices. Leadership of and participation in the UEP Certified program by the vast majority of egg producers further demonstrates a broad commitment to the care of egg-laying hens. UEP also manages the national Egg Safety Center, a leading resource for consumer and industry information on the safe production of eggs and prevention of disease.

The livestock producers we represent have a significant interest in the draft memorandum because there is a very large, highly diverse and unique array of business arrangements in the livestock sector, making it quite distinct from most other business sectors. Because of the general geographic proximity and operation of these farms, state permitting agencies implementing current EPA Clean Air Act policies would have to weigh a variety of complex factors to determine whether farms should be considered a single production unit, analogous to a single facility or "plant." This would likely lead to inconsistent and unfair applicability of permitting programs among states and perhaps even within states.

With the sheer variety of businesses and functional relationships among livestock farms, it is imperative that EPA develop clear guidance for states to use to determine whether two or more farms should be aggregated as a single source. In our view, interpreting the term "adjacent" solely to one of physical proximity is a strong step in the right direction. As our comments below show, we believe the guidance could be strengthened by developing a bright line distance beyond which no two facilities would be considered part of the same source.

Our comments can be summarized as follows:

1. Interpreting the term "adjacent" based on physical or geographical proximity is the most objective and reasonable approach to determining whether two or more facilities should be aggregated as one common source. Excluding the concept of "functional interrelatedness" from the question of whether facilities are part of the same source eliminates complexity, confusion and opportunity for inconsistent application of the interpretation. Furthermore, an interpretation based on physical proximity follows the definitions in the Clean Air Act, court rulings, EPA's historical intent and the ordinary meaning of the term "adjacent."

2. There is no need to insert the concept of functional interrelatedness into the determination of contiguous or "adjacent" because the concept is addressed in a simple and clear manner in one of the other criteria in the three-prong test for source determinations. The criteria of "same industrial grouping" (same 2-digit SIC code or support facility) provides a simple means of evaluating functional relationships between sources and should be the only criteria used to assess the functional interrelatedness of sources.

3. We support strengthening the draft guidance by defining adjacency to exclude any pollutant-emitting activities under common ownership or common control that are taking place more than ¼ mile of each other.

Below is a detailed discussion of these comments.

A. The diverse nature of livestock production requires clear and simple criteria for source determinations.

As noted in the introductory statements, the process of farming and raising livestock often occurs across several farms and locations, and the ownership of these sites may vary significantly. The variability in the ownership and proximity of livestock production and its supporting facilities is staggering. Furthermore, the various stages of growth and development in the production cycle, such as farrowing, weaning and growing or finishing, may each occur on separate farms. Some of these farms may be down the road from each other. Some may be miles away. Some may be owned by the same families or businesses. Some may be operated by contract operators. Those contracts may be exclusive, or an operator may serve multiple farmers. The contracts are often short term, but many can be longer term. Some farms may have their own feed mills. Other farms may be served by a common feed mill that may or may not be co-located at a site that has some aspects of animal production on it. Supporting operations such as manure management facilities may be on the same site as livestock production, or they may be on separate sites several miles away. The permutations are endless, and the degree of functional interrelatedness among these sites cannot be easily categorized. The common-sense notion of a plant, as

discussed by the D.C. Circuit in *Alabama Power v. Costle*[1], likely does not exist in the form of the modern livestock production process. Instead, the common-sense notion of a livestock farm is more likely a single site with several barns carrying out their discrete function in the overall livestock production process.

As a result, if source determinations for the livestock sector involve subjective criteria such as whether functional interrelatedness exists between two sites, then these livestock farms will be subject to great uncertainty and inconsistency as state permitting agencies struggle with source determinations. Livestock farmers who might be required to obtain air permits will be subject to delay and unpredictability while state agencies wrestle with the subjectivity of the criteria and the variability of the physical and business relationships among farm operations.

Consequently, it is imperative for EPA's rules and guidance to provide clear and simple criteria, based on reasonable interpretations of the Clean Air Act and its regulations, so that permitting agencies and farmers may have more consistent and predictable application of air permitting programs. As the comments below will demonstrate, we believe guidance that interprets the term "adjacent" to mean physical proximity and that accounts for functional interrelatedness through the existing criteria of "same industrial grouping" (same 2-digit SIC code or support facility) is the most sensible approach.

B. EPA is correctly limiting the meaning of the term "adjacent" to mean physical proximity, based on Clean Air Act definitions, court rulings, EPA's historical interpretations and the plain meaning of the word.

The Clean Air Act contains several definitions of "source" and its derivatives. These definitions essentially serve the same purpose of defining the collection of emitting activities that should be grouped together for permitting or emission control programs, or both. These definitions focus on two criteria: whether the facilities operate under common control, **and** whether they are contiguous (meaning the properties touch).

None of those definitions include the term "adjacent" to describe the geographical or physical proximity of the collection of activities. The Title III definition of major source[2], the Title V definition of major source[3] and the various definitions of major source for the 1990 nonattainment area classifications[4] define major source using only the words "contiguous area" to describe the geographical relationship between activities. The choice of the words "contiguous area" strongly suggest Congress meant the facilities must be on contiguous properties or at the very least within close physical proximity. Furthermore, there is no hint in these definitions that contiguousness includes the concept of functional interrelatedness.

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[1] 636 F.2d 323 (1979)

[2] Definition of "major source" for purposes of Title III, 42 U.S.C. 7412(a)(1)

[3] Definition of "major source" for purposes of Title V, 42 U.S.C. 7661(2)

[4] See 42 U.S.C 7611a

Although Congress did not define major source or major modification to include the concept of contiguousness or adjacency for purposes of the PSD or Nonattainment NSR programs, EPA included those terms in the regulatory definitions to draw reasonable lines around which activities should be combined under the umbrella of a single source. EPA drew its guidance from the *Alabama Power* court, which instructed EPA to develop regulations that allow aggregation of activities based on proximity and ownership[5].

EPA's proposed interpretation that "adjacent" requires physical proximity rightfully follows the decision of the 6th Circuit Court of Appeals' determination in the *Summit Petroleum*[6] ruling. The 6th Circuit found that EPA had incorrectly injected a functional relationship test into the evaluation of whether two sources were "adjacent" under the Title V definition of major source.

The court found that EPA's interpretation of the term "adjacent," by imposing functional relationship into the interpretation, ran contrary to the plain meaning of the term.

> *Here, we conclude that the EPA's interpretation of the requirement that activities be "located on contiguous or adjacent properties," i.e., that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity.*[7]

Finally, EPA's use of the term "adjacency" to capture the concept of "touching or in close proximity" is appropriate because it adheres to the common sense, plain English definition of "adjacent." In this context, the word "adjacent" has only a geographical proximity connotation, and the concept of functional interrelatedness is not relevant.

Merriam-Webster's online dictionary, merriam-webster.com, defines "adjacent" as[8]:

> **a :** not distant: NEARBY the city and *adjacent* suburbs
> **b :** having a common endpoint or border *adjacent* lots *adjacent* sides of a triangle
> **c :** immediately preceding or following

Similarly, dictionary.com defines adjacent as[9]:

> *1. lying near, close, or contiguous; adjoining; neighboring: a motel adjacent to the highway.*
>
> *2. just before, after, or facing: a map on an adjacent page.*

As illustrated by both definitions, "adjacent" means close geographical proximity. Neither of these definitions describe "adjacent" in terms of some kind of functional relationship between the nearby entities.

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[5] Alabama Power v. Costle, 636 F.2d 323, 397
[6] Summit Petroleum Corp. v. United States Environmental Protection Agency, 690 F.3d 733 (6th Cir. 2012)
[7] Id., at 744.
[8] https://www.merriam-webster.com/dictionary/adjacent, URL last visited October 2, 2018.
[9] https://www.dictionary.com/browse/adjacent?s=t?s=t, URL last visited October 2, 2018

Consequently, the determination whether emission sources are "adjacent" for purposes of Clean Air Act programs should focus only on the geographical relationship. The operative question should be: Are the facilities in close enough proximity that common sense would define them as a single source? If the sources are further away than sharing borders or within easily visible range, then they can't be "adjacent," regardless of the functional relationship of the facilities. The facilities aren't physically close enough to fall within the common-sense notion of a single plant.

For this reason, we support EPA's interpretation of "adjacent" that is based solely on physical proximity.

C. There is no need to include the concept of functional interrelatedness in the adjacency criteria because the criteria of "same industrial grouping" (same 2-digit SIC code/support facility) provides a simple means of evaluating functional relationship between sources and should be the only criteria used to assess the functional interrelatedness of sources.

EPA has already addressed the concept of functional interrelatedness in the definitions of source when it established the criteria that sources must be in the same 2-digit SIC code (or a support facility) to be aggregated as a common source. The 2-digit SIC code provides a simple and predictable means of identifying which facilities are functionally related and, therefore, candidates for grouping together if the sources are under common ownership/control and close in proximity.

The *Alabama Power* court emphasized to EPA in 1979 that operations should be aggregated as a single source, using factors such as proximity and ownership. EPA in turn converted the court's guidance into the three factors used in today's source determinations (common ownership/control, same 2-digit SIC code/support facility and contiguous/"adjacent"), and the agency asserted that the rules comport with the common-sense notion of a plant.

In the preamble to the August 7, 1980, final NSR rules, EPA clearly stated its preference for using the 2-digit SIC code over abstract criteria such as the functional relationship[10].

> *In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities based on their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made*

[10] 45 FR 52695

administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.

Using the 2-digit SIC Code provides a simple means of assessing the functional relationship between sources to determine if the facilities meet the common-sense notion of a plant. Conversely, the functional relationship between two sources has no place in the determination of whether two sources are physically contiguous or "adjacent." Furthermore, the concept of functional interrelatedness utilizes no physical limitation on how far apart two sources may be. This clearly violates the common-sense notion of a plant mandated in the *Alabama Power* ruling. The terms contiguous and "adjacent," in their normal meanings, have no connotation other than geographical or physical proximity.

It makes no sense for EPA to tout the administrative ease and efficiency of the 2-digit SIC Code criteria, then completely undermine it by injecting the functional relationship between sources as part of the assessment of whether the sources are contiguous or "adjacent" – words that mean physical proximity.

Consequently, we strongly support limiting the evaluation of functional relationship to the 2-digit SIC code provisions already built into the source determination process, and we support limiting the scope of the term "adjacent" to a specific distance that reflects the concept of physical proximity.

We also believe EPA's initial characterization of the 2-digit SIC code (or alternatively the support facility test) provides the clearest method for assessing the functional relationship between facilities in the assessment of whether the operations comprise a single source. A separate functional interrelatedness test serves no beneficial purpose in the source determination process.

D. EPA should strengthen its draft guidance to clarify that activities separated by more than ¼ mile are not contiguous or "adjacent" and therefore not part of the same source.

We urge EPA to add greater clarity to the concept of adjacency by creating a presumption that sources more than ¼ mile apart are not contiguous or "adjacent".

A specific distance provides clarity and simplicity in administration. The ¼-mile distance is a reasonable interpretation of the term "adjacent" and reflects the common-sense notion of what a single plant/facility/farm is.

Further guidance could describe how to evaluate multiple activities in an area. As described earlier in these comments, a livestock operation can consist of multiple farms and other facilities spread across a large area. It does not make sense to combine those facilities such that the first and last operations in a chain are separated by a distance that no longer resembles the common-

sense notion of a plant. We support the approach used by Louisiana: define the geographical center of the source and exclude those facilities farther than ¼ mile from that geographical center.

Thank you for the opportunity to comment on this important issue with significant implications for livestock producers across the country and to continue our longstanding efforts to work cooperatively with EPA to ensure development of sound policy for all stakeholders. If you have any questions, please do not hesitate to contact Michael Formica at the National Pork Producers Council at 202-347-3600.

Sincerely,

National Pork Producers Council
American Farm Bureau Federation
National Cattlemen's Beef Association
National Council of Farmer Cooperatives
United Egg Producers

NATIONAL ASSOCIATION OF Manufacturers

Ross E. Eisenberg

Vice President
Energy & Resources Policy

October 5, 2018

The Honorable William L. Wehrum
Assistant Administrator Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Draft Guidance Memorandum: Interpreting "Adjacent" for New Source Review and Title V Source Determination in All Industries Other Than Oil and Gas

The National Association of Manufacturers (NAM), the nation's largest manufacturing association, representing manufacturers in every industrial sector in all 50 states, submits these comments on the above-referenced draft guidance memorandum by the Environmental Protection Agency (EPA) that communicates the Agency's definitional interpretation of "adjacent" for New Source Review (NSR) and the Title V source determinations for all industrial sectors other than oil and gas. The NAM supports streamlining the NSR permitting process, and it is with this ultimate goal in mind that the NAM provides the following comments on EPA's NSR draft guidance memorandum.

Manufacturers in America are pioneers that make modern, everyday life possible through their innovation and environmental stewardship. As inherent problem solvers, reducing waste, including air emissions, is a priority. Manufacturers spends billions of dollars annually toward air quality protection and has achieved remarkable improvements in this field. Over the past decade, manufacturers have significantly reduced their emissions, and played a prominent role in helping the United States reduce its collective emissions of EPA's six criteria pollutants by 73 percent since 1970.[1] However, manufacturers continue to struggle with the complex NSR permitting program, which is plagued by a myriad of case-by-case examinations that rely on vague criteria found in a complex array of guidance – much of which is inconsistent but has generally trended toward expanding NSR applicability. Confusion over NSR applicability slows economic growth, job creation, technological innovation, and the nation's ability to modernize infrastructure, sacrificing both economic and environmental efficiency. Streamlining and further clarifying the NSR permitting process will provide more certainty to companies seeking to invest in new facilities and to improve existing facilities, benefiting the economy and the environment.

While the NAM believes that the draft guidance is a step in the right direction, the NAM recommends that EPA go a step further and provide a more definitive interpretation of "adjacent" for NSR and Title V source determinations for all industrial sectors other than oil and gas. Manufacturers that fall outside of the oil and gas sectors would prefer "a 'bright line'

[1] Environmental Protection Agency. Clean Air Act Overview, available at https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health.

distance for clarifying the meaning of 'adjacent' based on proximity . . .".[2] As EPA removes the uncertainty surrounding the term "adjacent," the agency must also allow exceptions to be made on a case-by-case basis for NSR determinations for facilities located outside the bright-line distance, if sought by the permittee.

The NAM appreciates that the draft guidance further clarifies EPA's interpretation of "adjacent" and reinstates the Agency's original intent when the NSR program was first established in 1980.[3] This would ensure that time-sensitive projects are not put at risk. Overly complex and vague guidance will slow the NSR permitting process, jeopardizing manufacturers who seek permits for time-sensitive projects, including those that promote both economic and environmental efficiency. Getting new products and materials to market quickly is essential to our manufacturing competitiveness.

Thank you for the opportunity to provide these comments on EPA's draft guidance memorandum. NAM members are directly impacted by Title V and New Source Review permitting programs and support streamlining their applicability determination processes. By further clarifying how EPA interprets "adjacent", the EPA will continue to remove obstacles that undercut the productivity gains and improved air quality that result from modern manufacturing methods.

Please feel free to contact me if the NAM can be of further assistance.

Sincerely,

Ross Eisenberg
Vice President
Energy and Resources Policy

[2] 81 FR at 35622 (June 3, 2016).
[3] Environmental Protection Agency. Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas. 4 September 2018.

NEDA CAP CLEAN AIR PROJECT
The National Environmental Development Association's Clean Air Project

October 3, 2018

By Electronic Mail
Adjacency_Guidance@epa.gov
Raj Rao and Cheryl Vetter
EPA Office of Air Quality, Planning & Standards
104 T.W. Alexander Drive
Research Triangle Park, NC 27711
Attn: Nizich.greg@epa.gov.

RE: "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

Dear Sir or Madam:

Introduction and General Comments – The National Environmental Development Association's Clean Air Project ("NEDA/CAP") appreciates this opportunity to comment on draft guidance that clarifies that two or more sources are "adjacent" if they are physically proximate or "nearby" for purposes of determining if they are part of the same "stationary source," "major stationary source," or "major emitting facility" pursuant to the Clean Air Act. NEDA/CAP is a coalition of manufacturing industries that own and operate facilities across the United States. They are affected directly by EPA's definition of "major source," because its meaning is determinative of whether a source requires a CAA New Source Review and/or a Title-V permit to construct, expand, and operate its plant. NEDA/CAP agrees that this "interpretation" is needed because public confusion persists on the meaning of "adjacent" despite 2012 and 2014 federal court decisions that rejected EPA's definition of adjacent based on their "functional interrelationships" rather than proximity. *NEDA/CAP v. EPA, 752 F.3d 999, 1009* (D.C. Cir. 2014) (*vacating EPA's 2013 "Summit Directive"*[1]*); Summit Petroleum v. EPA,* 690 F.3d 733 (6th Cir. 2012) (*vacating EPA's finding that gas wells and a sweetening plant located as many as 30 miles from each other were "adjacent" and thus part of the same "major stationary source for purposes of applicability of Title V permitting*).

NEDA/CAP generally considers the September 4, 2018 "Draft Interpretation" to be legally consistent with EPA regulations, and to be consistent with the judicial directives to the agency to implement the definitions of a "major source" and "major emitting facility" to be consistent with a "common sense notion of a plant." *See* 45 FR 52676, 52694 (August 7, 1980)

[1] P. Tsirigotis, EPA OAQPS Director, "*Applicability of the Summit Decision to EPA Title V and NSR Source Determinations* (Dec. 21, 2013)

(citing *Alabama Power* Co. *v. Costle*, 636 F. 2d 323, 397 (D.C. Cir. 1979)).[2] NEDA/CAP concurs with the clear direction that EPA offers in the memorandum, including statements that the inclusion of criteria similar to "shared equipment" and "the existence of functional relationships such as a pipeline, railway or other dedicated conveyance like a transmission line should not be invoked to establish "adjacency."
We suggest additional clarifications below, and urge EPA to finalize the Memorandum expeditiously. In particular, NEDA/CAP urges EPA to include as part of its definition of "adjacent" a distance between stationary sources that are commonly owned and operated, beyond which EPA would not generally expect to find that facilities are part of the same "major source," just as it has done through regulations for the oil and gas industry.

A. Focusing Exclusively on Proximity in Applying the Term "Adjacent" Is Legally Required.

NEDA/CAP strongly supports the Draft Interpretation of "adjacent" as "physically proximate." As NEDA/CAP argued in *NEDA/CAP, supra,* interpretation of the term "adjacent" in the definition of "stationary source" must be based legally on geographic proximity.[3] Thus, we have argued that any interpretation of "adjacent" that is based on "functional interrelationships" is legally in error and unreasonable based on EPA's regulations. Any definition of "adjacent" in the definition of "stationary source" also is inconsistent with the D.C. Circuit's finding in *Alabama v. Costle,* 636 F.3d 323, that EPA may allow for aggregation only "where appropriate, of industrial activities according to considerations such as proximity and ownership." *Id.* at 397. It is unreasonable for functional relationships of manufacturing facilities that are located miles apart to be considered part of the same plant, requiring them to be aggregated for purposes of Clean Air Act permit applicability just because they may produce intermediaries or parts for products assembled elsewhere. For similar reasons, EPA itself found in the 1980 NSR rulemaking, that--

> To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under the definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess these interrelationships would have embroiled the agency in numerous fine-grained analyses.

45 Fed. Reg. 52,676, 52695 (Aug. 7, 1980).

Moreover, there is no need to do further rulemaking to withdraw the prior erroneous and illegal agency interpretations of "adjacent," since EPA has not in the past 48 years modified the regulatory definitions of a "major source" or "major emitting facility" that rejected a definition of "adjacent based on functional interrelationships. Instead, EPA adopted a definition of

[2] See Draft Interpretation at page 3, FN 11.
[3] While the Court did not rule on its argument, as EPA notes in the Draft on page 3, NEDA/CAP is on record before the D.C. Circuit making the argument that Summit Directive, *supra at 1,* was not legally permissible.

"adjacent" that was based on geographic proximity and subsequently adopted the same definition from the 1980 PSD regulations in the definition of "major source" in the Title V regulations in 2002.[4]

B. EPA Should Withdraw All "Major Source" Determinations Based on "Findings of Functional Inter-relationships."

EPA officials told NEDA/CAP members at a September 5, 2018 meeting at the Office of Air Quality Planning and Standards that the agency intends to retain on EPA's website the numerous prior agency interpretations of "adjacent." NEDA/CAP submits that to do so would be confusing to all stakeholders, including permit authorities, permit applicants, and the public. The agency should retain only those determinations that are consistent with this Final Interpretation that concern permit decisions related to the physical proximity of sources. Also, since NEDA/CAP argues below that there is a predicate for defining adjacent with reference to a bright line distance, interpretations of "adjacent" that are based on distances no longer consistent with the finalized interpretation also should be withdrawn. If EPA intends to maintain archival copies of historic interpretations of the term "adjacent," these interpretations should be clearly notated or watermarked as having been "superseded" by this interpretation when it is finalized.

C. EPA Should Not Invite Permit Authorities to Consider Factors Other than Physical Proximity.

In the Draft Memorandum's concluding paragraph, EPA says that "States with approved NSR and Title V programs remain responsible for determining in the first instance whether in their discretion specific facilities are adjacent. They are not required to apply the interpretation set forth in this memorandum."[5] Similarly, on the next to the last page, EPA states that "permitting authorities will still be responsible for making case-specific determinations, taking account of the facts and circumstances."[6] NEDA/CAP objects to these statements as being inconsistent with the Clean Air Act.

First, EPA should not condone in any manner unlawful interpretations of the word "adjacent," for the reasons stated above. To do so would be inconsistent with legal precedent and unreasonable given the confusion that have plainly inconsistent definitions of the term would continue to introduce into Clean Air Act permitting. Second, nearly all State New Source Review programs, whether delegated or SIP-approved, utilize EPA regulations defining "stationary source" or "source" for purposes of aggregating emissions activities for applicability of "major source thresholds" verbatim, so there is no legal basis for EPA-approved State programs to use a different definition of "adjacent," just because they are SIP-approved rather than delegated air permit programs. (Moreover, in the case of Title-V programs, EPA's approval of State programs is not SIP-based. All Title V programs must be consistent with the federal program, even if lower T-V applicability thresholds apply.) Third, the Draft Memorandum's conclusion that States need not apply EPA's interpretation is bad public policy. It is an invitation that could lead to non-consistent "major source" determinations across the county,

[4] See Draft, page 4.
[5] See Draft, page 8.
[6] Draft, page 7.

sowing confusion and leading to an uneven playing field for industry and the public. Therefore, EPA must advise Regional Offices reviewing final permit decisions that case-by-case determinations should be consistent with this EPA interpretation, and their applicability to adjacent activities thoroughly explained, to avoid permitting confusion and legal inconsistency. NEDA/CAP urges EPA to re-examine and remove these statements allowing permitting inconsistency between States on the application of the term "adjacent."

D. NEDA/CAP Disagrees that this Interpretation Should Be Applied Only Going Forward.

The Draft Interpretation argues that it would be wasteful and confusing for EPA to apply the "Final Interpretation" retroactively to plants and other emitting equipment that are already permitted, even if that would be legally preferable. NEDA/CAP disagrees, again because we believe that there *was* no legal justification for prior aggregations of sources that were not physically PROXIMATE under a legally deficient interpretation of the term "adjacent." Therefore, for sources that have received Title V or NSR permits based on misapplication of that term, owners and operators of affected sources should be able to request permitting authorities to "dis-aggregate" emitting activities that were improperly combined because of "functional interrelationships." In some cases, improper aggregation of sources can stifle growth and improperly impose additional costs of New Source Review and permitting on owners and operators of affected facilities in the future. Therefore, the Final Interpretation should state that it is permissible for owners and operators of regulated Title V- and NSR-affected permits to request that they be disaggregated and that such actions should be compelled on the part of all permit authorities.

In addition, NEDA/CAP urges EPA to include a precaution in the Final Interpretation that where sources were once aggregated based on their proximity, but are no longer under common ownership or control, they too should be "dis-aggregated" under most circumstances, especially if factual criteria analyzed in EPA's Meadowbrook Energy and Keystone Landfill Common Control Analysis (Apr. 30, 2018) determination are applicable.

E. The Final Interpretation Should Allow Sources That Generated Netting Credit to Be Separated Under Most Situations.

NEDA/CAP also disagrees with EPA's position that if two or more facilities were aggregated improperly under the functional interrelationship definition of "adjacent," and they thereafter relied on that interpretation in a contemporaneous netting analysis, then the operations should continue to be considered one source provided the common control and same industrial grouping criteria continue to apply. There is no legal basis for disallowing a proper re-classification of a source as two separate non-adjacent sources on the basis that the two sources, that were improperly aggregated under prior EPA policy, were involved in a prior contemporaneous netting analysis. A future re-classification as two separate sources changes nothing about a prior NSR project, assuming proper netting occurred when the activities were classified as a single source. Any emission limitations set during the contemporaneous netting exercise would continue to apply unless modified through subsequent permitting actions. The only caveat, in NEDA/CAP's view, would be that any *future* netting analysis should not rely on

any "contemporaneous" emission reductions that were relied upon for any prior emission increases. For this reason, NEDA/CAP recommends that the final guidance should not include the current draft's restriction on the ability to correct the source classification if the source was previously involved in a contemporaneous netting analysis.[7]

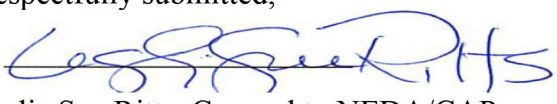
In addition, the Final Interpretation should be caveated to prohibit any party including EPA or a State or Citizen, from attempting to enforce retroactively a netting determination that came about based on application of EPA's unlawful interpretation of "adjacent."

F. EPA Should Reconsider and Provide in the Final Memorandum a Bright Line Definition of "Adjacent."

Because case-by-case decision making slows NSR permitting and puts those businesses seeking permits for time-sensitive projects in a highly coercive "negotiating" environment, NEDA/CAP asks the Agency to reconsider its current stance rejecting a bright-line test for determining when sources are adjacent, based on the distance between source fence-lines. Based on the reasoning for oil and gas wells presented in the rulemaking establishing the regulatory definition of "adjacent" for the oil and gas industry, EPA should apply the same reasoning here and establish a bright-line determination that "in no case should a permitting authority find that two parcels separated by more than a quarter of a mile is adjacent." Alternatively, the Agency should, based on the same legal predicate, include in its Final Interpretation that "although this Interpretation does not set a bright line distance for determining adjacency, EPA feels that it would be extremely rare for a permitting authority to encounter a situation where a separation greater than a quarter of a mile would support a finding that two parcels are adjacent." Neither solution would in NEDA/CAP's view require a regulatory action based on the prior rulemaking for the oil and gas industry, which we believe represented more complex facts and was not challenged before the D.C. Circuit.

Conclusion – NEDA/CAP reiterates its strong view that this Interpretation is needed. There continues to be confusion among stakeholders on when aggregation of sources for CAA permitting should occur, based on historic EPA definitions of "adjacent" based on functional interrelationships of various types of commonly owned equipment and facilities. Therefore, NEDA/CAP urges the agency to make the proposed changes to the interpretation that we have requested and to issue the Draft Memorandum in final form as soon as possible to ease permitting confusion and related resource burdens for our members and other interested stakeholders. If you have questions or want to discuss these comments further, we would be delighted. Please contact me at 703.823.2292 or LRitts@rittslawgroup.com.

Respectfully submitted,



Leslie Sue Ritts, Counsel to NEDA/CAP

[7] NEDA/CAP believes that a similar analysis would apply to emission reductions included in Step 1 Project Emissions Accounting.

Cc: David Harlow, Office of Air & Radiation General Counsel & Deputy Assistant Administrator

www.ntaatribalair.org
928.523.0526 office
928.523.1266 fax

National Tribal Air Association
P.O. Box 15004
Flagstaff, AZ 86011-5004

October 5, 2018

William Wehrum
Assistant Administrator
Office of Air and Radiation
U.S. EPA Mail code: 6101A
1200 Pennsylvania Ave, N.W.
Washington, DC 20460

Re: Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas

Honorable Assistant Administrator Wehrum:

The National Tribal Air Association (NTAA) is pleased to submit these comments requested to your September 4, 2018, Memorandum regarding *Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas.*

The NTAA is a member-based organization with 135 principal member Tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is also important to understand interactions with the organization do not substitute for government-to-government consultation, which can only be achieved through direct communication between the federal government and Indian Tribes.

On September 5, 2018, US Environmental Protection Agency (EPA) released a draft guidance that would change the interpretation of "adjacent" used as a factor in determining whether to combine nearby stationary sources for the Clean Air Act New Source Review (NSR) permitting and Title V Source Determinates in All Industries other than oil and gas.[1]

In response to the draft guidance, NTAA finds that EPA's new interpretive memo purports to provide clarity and consistency to the regulated community and state/local permitting authorities on the issue of determining whether "adjacent" sources should be considered as a single air pollution source under the CAA. However, EPA's draft guidance falls short of this goal. EPA's past practices on this topic are well established

[1]Draft Guidance: Interpreting Adjacent for New Source and Title V Source Determinations in All Industries other than Oil and Gas. September 2018. http://www.epa.gov/sites/production/files/2018-09/documents/draft_adjacent_policy_memo_9_04_2018.pdf

www.ntaatribalair.org
928.523.0526 office
928.523.1266 fax

National Tribal Air Association
P.O. Box 15004
Flagstaff, AZ 86011-5004

and well understood. By changing the procedures and introducing new criteria to be used in making the single-source determination, the draft EPA guidance, in reality, will increase the uncertainty. Clarity and consistency would be better served by leaving the current EPA guidance in place.

Based on NTAA's review of the draft guidance, EPA is stressing that proximity or physical distance between neighboring sources is the only valid criteria for consideration in making a determination of whether or not multiple emission sources would be considered "adjacent." Nevertheless, the EPA draft guidance in its present form provides no clear direction in how to make such a determination regarding proximity other than to dismiss the historical concept of "functional interrelatedness" as one of the decision-making criteria. Consistent with past practices and historical precedent, EPA's draft guidance does appear to endorse the concept of "common sense notion of a plant" as an important element of the required analysis and we would agree that "common sense notion of a plant" is a relevant criterion for use in conjunction with "functional interrelatedness". However, when addressing "common sense notion of a plant," the various relationships between adjacent facilities must be evaluated to determine if they indeed operate as a single facility. It is inconsistent to maintain "common sense notion of a plant" as the primary basis for the single-source determination while at the same time dismissing "functional interrelatedness." "Functional interrelatedness" must be addressed in order to appropriately assess whether two adjacent facilities meet the criteria for "common sense notion of a plant." These concepts go hand-in-hand and should not be separated.

As a matter of practice, EPA's policy should be to err on the side of environmental protection when making single-source determinations where uncertainty exists. Aggregating adjacent sources into a single source for the purposes of the CAA could in some circumstances create one major source for regulation instead of two adjacent minor sources. In general, such a determination would have the effect of introducing better overall environmental protections, such as Best Available Control Technology, where such requirements would not otherwise exist if the adjacent sources were classified as non-major. EPA's draft memorandum, in conjunction with other similar EPA actions such as the recent interpretation on "common control," increases the potential for regulated sources to subvert the intentions of the CAA by deliberately structuring projects to avoid aggregation and thereby avoid emission controls that would otherwise be required under the CAA. EPA should not make it easier for regulated industries to avoid the application of emissions controls on new/modified sources. Overall, the guidance should clearly include "functional interrelatedness" of operations to determine facilities are "adjacent".

Although the EPA is proposing that it is adequate to rely on the existing rule language, this disregards many years of prior EPA guidance on how this should be interpreted. This change in the rule's interpretation will likely reduce the sources subject to Major Source review and it is reasonable to expect that it should be changed through updating the rule language.

There are a number of major and minor sources located near or in Tribes and Alaskan Native Villages communities. The EPA's interpretation of "adjacent" would apply to "stationary sources" categorized as Minor Sources and Major Sources that are located or near Tribes and Alaskan Native Villages. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) instructs EPA to consult with Tribes on guidance that may have an impact on Indian

www.ntaatribalair.org
928.523.0526 office
928.523.1266 fax

National Tribal Air Association
P.O. Box 15004
Flagstaff, AZ 86011-5004

Country to ensure the federal government's trust responsibility to Tribes. The EPA must consult with Tribes on changes to the interpretation of "adjacent" for stationary sources for the CAA New Source Review (NSR) permitting and Title V Source Determinates.

By changing the interpretation of "adjacent", Tribal communities' ability to protect air quality and resources on Tribal land is undermined and threatens Tribal health, welfare, and economic security.

The NTAA is pleased to provide the aforementioned comments regarding the draft guidance on EPA's interpretation of "adjacent" in the context of CAA permitting. Thank you for your attention to these comments. If you should have any questions about these comments, please feel free to contact NTAA's Project Director, Andy Bessler at andy.bessler@nau.edu or 928-523-0526

On Behalf of the National Tribal Air Association's Executive Committee,

Wilfred J. Nabahe
Chairman
National Tribal Air Association's Executive Committee

CC: Adjacency_Guidance@epa.gov

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Daniel L. Meyer, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711

October 5, 2018

William L Wehrum
Assistant Administrator
USEPA
Mail Code 6101A
1200 Pennsylvania Avenue, NW
Washington DC 20460

Subject: Wisconsin DNR Comments on Draft Guidance: Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other than Oil and Gas

Dear Mr. Wehrum:

The Wisconsin Department of Natural Resources (WDNR) appreciates the opportunity to comment on EPA's attempt at clarifying the interpretation of "adjacent" in the draft guidance, "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas", as presented in a draft letter dated September 4, 2018.

The stated purpose of this guidance is to reduce uncertainty regarding the meaning of the term "adjacent" as it relates to source determinations. This clarification is important for ensuring consistency in source determinations across the country.

EPA should clarify and expand their guidance to provide examples of case-specific facts and circumstances permitting authorities can take into account when determining if operations are adjacent.

In this guidance, EPA states that adjacency determinations should not consider interrelatedness and should be based solely on proximity, but EPA does not specify a bright-line distance for making such determinations. EPA also reaffirms that source determinations must be made on a case-by-case basis. Consequently, WDNR requests EPA to provide examples of case-specific facts and circumstances permitting authorities can take into account when determining if sources are adjacent. Although EPA is addressing industries other than oil and gas, EPA could utilize some of the methodologies for determining adjacency in the oil and gas rule, such as how roadways, waterbodies and intervening property are considered. Other options to provide clarity would be to utilize a dictionary definition of adjacency or to consider a range of distances beyond which sources are clearly not adjacent.

WDNR encourages EPA to provide direction to their regional staff who review these determinations to ensure consistent application of this guidance nationwide.

Thank you for the opportunity to comment on this draft guidance. Please contact Kristin Hart at (608) 266-6876 or Kristin.Hart@wisconsin.gov if you have any questions regarding these comments.

Sincerely,

Gail E. Good

Gail Good
Director, Air Management Program
Wisconsin Department of Natural Resources

Cc: Bart Sponseller, Deputy Division Administrator – WDNR EM/7
Kristin Hart, Chief Air Permits and Stationary Source Modeling Section – WDNR AM/7

Adjacency Comments Made through the Portal with No Attachment

1) Submitted on 10/02/2018 4:29PM
Submitted values are:

First Name: Amber
Last Name: Potts
Organization: *Wyoming Department of Environmental Quality - Air Quality Division*
Email address: amber.potts@wyo.gov

Comment:
The Wyoming Department of Environmental Quality - Air Quality Division (AQD) appreciates the opportunity to review the draft memorandum "Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other than Oil and Gas." The AQD concurs with the general conclusion of the memo, that the term adjacent does not include functional interrelatedness; evaluating adjacency is a case specific determination based on proximity.
The AQD agrees with EPA that the term "adjacent" for aggregation purposes under NSR and Title V Source Determinations should be based on a case-by-case determination, and does not include functional interrelatedness.

2) Submitted on 10/03/2018 3:22PM
Submitted values are:

First Name: Don
Last Name: Smith
Organization: *Minnesota Pollution Control Agency*
Email address: don.a.smith@state.mn.us

Comment:
The Minnesota Pollution Control Agency (MPCA) appreciates the opportunity to provide comment on this draft memorandum from William L. Wehrum. The draft memorandum ("Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas" (Draft for Public Review & Comment, September 4, 2018) discusses the "adjacent or contiguous" criterion that must be satisfied for determining the stationary source under the New Source Review and Title V operating permit programs.

In its role as the air quality permitting authority for Minnesota, the MPCA has made many "source determinations" under our Prevention of Significant Deterioration (PSD) and Part 70 Operating permitting programs. Based on this experience, we neither support nor opposed EPA's decision to remove "functional interrelatedness" of operations as a relevant consideration in the determination of adjacency in its permitting programs.

However, the draft memorandum recommends that the interpretation presented in this memorandum be used "from this point forward" for initially "assessing whether a given pair or set of operations are adjacent." Since functional interrelatedness may have been previously considered in determining

adjacency, we believe that the owners or operators of aggregated emission units currently grouped as one stationary source may request to be reclassified as separate sources where adjacency was solely a result of functional interrelatedness. When considering this type of a request, the MPCA believes that previous permitting actions – such as netting – should be reviewed in a manner similar to that used when relaxing a limit taken to avoid PSD (i.e., the process used to address the relaxation of a "40 CFR § 52.21(r)(4)" limit) to address the effects of reclassifying the stationary source. We urge the EPA to clarify this in the final memorandum.

Notwithstanding our comments above regarding the role of "functional interrelatedness" in the context of adjacency, the MPCA believes that the functional interrelatedness must not be discarded completely in source determinations. It is a helpful and appropriate consideration, especially for identifying activities that make up support facilities. As noted in the August 7, 1980 preamble (45 FR 52695), "support facilities … assist in the production of the principal product." For example, a boiler located adjacent to a manufacturing facility and provides it steam or electricity certainly assists in its production and reasonably conforms to a common sense idea of a plant. The manufacturing process is functionally dependent on the boiler (i.e., the boiler and the process are interrelated).

It also bears noting that the MPCA considers surface connections (e.g., dedicated railways and roads) and certain subsurface connections (e.g., steam pipelines owned or controlled by the Permittee) to be indicators of contiguous properties. When considering these physical connections, the source determination remains subject to the consideration of the relative proximity of the emitting activities and their industrial classification.
(See 45 FR 52695.)

3) Submitted on 10/05/2018 1:49PM
Submitted values are:

First Name: Joy
Last Name: Wiecks
Organization: *Fond du Lac Band of Lake Superior Chippewa*
Email address: joywiecks@fdlrez.com
Comment:
October 5, 2018

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code 28221T
1200 Pennsylvania Ave, NW
Washington, DC 20460

Subject: Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas

Introduction
The Fond du Lac Band (the Band) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA)'s proposed change in interpretation of "adjacent" in permitting actions.

The Fond du Lac Band of Lake Superior Chippewa ("the Band") is a federally recognized tribe with a Reservation located in northeastern Minnesota. The Band retains hunting, fishing and gathering rights on more than 8 million acres of territory in Northeastern Minnesota ceded to the United States government under the Treaties of 1837 and 1854. The Band also exercises Treaty Rights in the 1837 and 1842 Ceded Territories of Wisconsin and Michigan. The Band has Treatment as an Affected State status for air related activities that take place near the Reservation and/or other tribal lands. The Band reviews local state-issued permits during public comment periods, not just for the state of Minnesota but also for sources located in Wisconsin. This is because there is a substantial Native population in the city of Duluth, Minnesota, which is located very close to several major sources in Superior, Wisconsin.

Proposal

On September 4, 2018, the EPA issued a memorandum from Assistant Administrator William Wehrum to EPA Regional Air Division Directors that seeks to narrow how the EPA interprets "adjacent" for all industrial categories other than oil and gas. The EPA states that the guidance provided in this memo will provide clarity and consistency to sources. However, the EPA's past practices on adjacency are long established. Changes in procedures and required criteria will only serve to increase regulatory uncertainty, especially as this new policy may result in court proceedings.

The EPA argues that proximity or physical distance between neighboring sources is the only valid criteria in determining whether or not sources would be considered "adjacent". However, the EPA draft guidance provides no clear direction in how to make such a determination regarding proximity other than to dismiss the historical concept of "functional interrelatedness" as one of the decision-making criteria. Consistent with past practices and historical precedent, EPA's draft guidance does appear to endorse the concept of "common sense notion of a plant" as an important element of the required analysis and the Band would agree that "common sense notion of a plant" is a relevant criterion for use in conjunction with "functional interrelatedness". However, when addressing the "common sense notion of a plant," the various relationships between adjacent facilities must be evaluated to determine if they actually operate as a single facility. It is inconsistent to maintain a "common sense notion of a plant" as the primary basis for the single-source determination while at the same time dismissing "functional interrelatedness."

"Functional interrelatedness" must be addressed in order to appropriately assess whether two adjacent facilities meet the criteria for "common sense notion of a plant." These concepts go hand-in-hand and should not be separated.

Where uncertainty exists in making single-source determinations, the EPA's policy should be to err on the side of environmental protection. Aggregating adjacent sources into a single source for the purposes of the Clean Air Act
(CAA) could, in some circumstances, create one major source for regulation instead of two adjacent minor sources. In general, a major determination would introduce stronger overall environmental protections, such as Best Available Control Technology, whereas such requirements would not otherwise exist if the adjacent sources were classified as non-major. EPA's draft memorandum, along with other similar EPA actions such as the recent interpretation on "common control," increases the potential for regulated sources to undermine the intentions of the Clean Air Act by deliberately structuring projects to avoid an aggregation determination and thus avoid emission controls that would otherwise be required. EPA should not make it easier for regulated industries to avoid the application of emissions controls to new/modified sources. Overall, the guidance should clearly include "functional interrelatedness" of operations to determine facilities are "adjacent".

Finally, the Band believes that a new interpretation of the CAA with such a high potential to reduce the number of sources that are required to go through major source permitting should be done through a formal rulemaking, not through guidance. This change could undermine and threaten tribal health, welfare, and economic security. For further discussion, please call me at 218-878-7108.

Sincerely,

Joy Wiecks
Air Coordinator
Fond du Lac Band

c.c. Sean Copeland – Fond du Lac Legal Counsel
Ben Giwojna – Region 5 Project Officer